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MASSACHUSETTS REPORTS

228

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JULY 1917 — DECEMBER 1917

HENRY WALTON SWIFT

REPORTER

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.
HON. WILLIAM CALEB LORING.
HON. HENRY KING BRALEY.
HON. CHARLES AMBROSE DE COURCY.
HON. JOHN CRAWFORD CROSBY.
HON. EDWARD PETER PIERCE.
HON. JAMES BERNARD CARROLL.

ATTORNEY GENERAL

HON. HENRY CONVERSE ATTWILL.

In pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission of briefs. The only exception to the rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

TABLE

OF THE CASES REPORTED.

Abele *v.* Beacon Trust Co. . 438
Ahern (Commonwealth *v.*) . 547
Annelin (Ryan *v.*) 591
Arafe *v.* Howe 46
Aronson *v.* Orlov 1
Ashley *v.* Three Justices of the Superior Court . . . 63
Atlantic Maritime Co. *v.* Gloucester 519
Attorney General (Harvard College *v.*) 396

Bailey *v.* Worcester Consolidated Street Railway . . 477
Barber (Leland *v.*) 144
Barker *v.* United States Fidelity & Guaranty Co. . 421
Barton Child Co. (Taylor *v.*) 126
Bay State Street Railway (Fall River *v.*) 575
Beacon Trust Co. (Abele *v.*) 438
Borden (Massasoit-Pocasset National Bank *v.*) . . . 581
Boston (Hasey *v.*) 516
Boston & Maine Railroad (Hurley *v.*) 365
——— (Krasnicki *v.*) . . . 354
——— (Marchant *v.*) . . . 472
Boston Elevated Railway (Danofsky *v.*) 97
Boston Optical Co. *v.* Globe - Optical Co. 84
Boston Tow Boat Co. *v.* Medford National Bank . 484
Bowes *v.* Henry 341
Bowles (Braun *v.*) 176
——— (Jamestown Portland Cement Corp. *v.*) . 176
Braun *v.* Bowles 176
Bright (Cunningham *v.*) . 385
Brouthers (Pitt *v.*) 298
Brown's Case 31
Brown *v.* Learmouth . . . 417
——— *v.* Peabody 52
Bruce *v.* Meserve 463
Buffinton (Sherman *v.*) . . 139
Burns *v.* Thorndike 552

Cambridge (Mayor of Cambridge *v.*) 249
Cangiano (Murray *v.*) . . . 435
Carr (Noyes *v.*) 339
Chace *v.* Gardner 533
Chadwick (Riverbank Improvement Co. *v.*) . . . 242
Chamberlain (Lefevre *v.*) . 294
Charron *v.* Day 305
Chertok *v.* Morang 598
Clancy's Case 316
Clapp (Murch *v.*) 569
Clarke (New York Central & Hudson River Railroad *v.*) 274
Clary (Partridge *v.*) 290
Cogliano *v.* Ferguson . . . 147
Cogswell *v.* Weston 219
Cohen *v.* Levy 383
Colt (Welch *v.*) 511
Columbia Electrical Engineering Co. *v.* Globe Optical Co. 84
Commissioner of Public Works of Boston *v.* Justice of the Municipal Court of Dorchester District of Boston 12
Commonwealth *v.* Ahern . 547

Commonwealth *v.* Coyne . 269
——— *v.* Galatta 308
——— (International Paper Co. *v.*) 101
——— *v.* LaPointe 266
——— (Locomobile Co. of America *v.*) 117
Connors *v.* Worcester Consolidated Street Railway. 357
Coyne (Commonwealth *v.*) 269
Creed (Philbrick *v.*) 382
Cummings (Regan *v.*) . . . 414
Cunningham *v.* Bright . . 385

Danofsky *v.* Boston Elevated Railway 97
Davidson's Case 257
Day (Charron *v.*) 305
——— *v.* Nichols 236
——— *v.* Old Colony Trust Co. 225
Donovan (Kirby *v.*) 86
Doucette *v.* Sallinger . . . 444
Durfee *v.* Kelly 571

Eastern Consolidated Amusement Co. (Ferry *v.*) . . . 259
Edison Electric Illuminating Co. (McSweeney *v.*) . 563
Ellis *v.* Hunt 39

Fall River *v.* Bay State Street Railway 575
——— (Goodwin *v.*) . . . 529
——— *v.* Public Service Commissioners 575
Falvey (Luiz *v.*) 253
Ferguson (Cogliano *v.*) . . 147
Ferry *v.* Eastern Consolidated Amusement Co. . 259
Fiorentini (Murray *v.*) . . 466
Fitzroy (Massaletti *v.*) . . 487
Foote (Negus *v.*) 375
Fournier (Whitman *v.*) . . 93
Fuller *v.* Fuller 441

Gagnon's Case 334
Galatta (Commonwealth *v.*) 308
Gardner (Chace *v.*) 533
——— *v.* New York, New Haven, & Hartford Railroad 545
Gardner Automobile Co. (Hurnanen *v.*) 346
Gethro (Lorando *v.*) . . . 181
Ginn (Parkhurst *v.*) . . . 159
Gleason (MacAlman *v.*) . . 454
Globe Optical Co. (Boston Optical Co. *v.*) 84
——— (Columbia Electrical Engineering Co. *v.*) . . . 84
——— (Harwood Brothers *v.*) 84
——— (Universal Optical Corp. *v.*) 84
Gloucester (Atlantic Maritime Co. *v.*) 519
Goodwin *v.* Fall River . . 529
Green *v.* Hussey 537
——— *v.* Kelley 602
Greenwood (Willard *v.*) . . 549

Harrison (Rose *v.*) 261
Hart Private Hospital (Vannah *v.*) 132
Harvard College *v.* Attorney General 396
Harwood Brothers *v.* Globe Optical Co. 84
Hasey *v.* Boston 516
Hayes *v.* Penn Mutual Life Ins. Co. 122
Henry (Bowes *v.*) 341
Hodgerney *v.* Worcester Consolidated Street Railway 477
Holbrook *v.* Seagrave . . . 26
Holland *v.* Zeuner 142
Houghton (Whiting *v.*) . . 429
Howe (Arafe *v.*) 46
Hunt (Ellis *v.*) 39
Hurley *v.* Boston & Maine Railroad 365
Hurnanen *v.* Gardner Automobile Co. 346
——— *v.* Nicksa 346
Hussey (Green *v.*) 537

International Paper Co. *v.* Commonwealth 101

Jamestown Portland Cement Corp. *v.* Bowles . . 176
Justice of the Municipal Court of Dorchester District of Boston (Commissioner of Public Works of Boston *v.*) 12

Kelley (Green *v.*) 602
Kelly (Durfee *v.*) 571
Kennedy (Taylor *v.*) . . . 390
Kerr *v.* Worcester Consolidated Street Railway . . 281
Kirby *v.* Donovan 86
Krasnicki *v.* Boston & Maine Railroad 354

LaPointe (Commonwealth *v.*) 266
Learmouth (Brown *v.*) . . . 417
Leavitt *v.* Maynes 350
Lefevre *v.* Chamberlain . . 294
Leland *v.* Barber 144
Lenox (Parsons *v.*) 231
Leslie *v.* Wilder 343
Levangie's Case 213
Levy (Cohen *v.*) 383
Locomobile Co. of America *v.* Commonwealth . . . 117
Lorando *v.* Gethro 181
Luiz *v.* Falvey 253
Lyford *v.* McFetridge . . . 285
——— (Robson *v.*) 318

MacAlman *v.* Gleason . . . 454
McDonough *v.* Metropolitan Life Ins. Co. 450
McFetridge (Lyford *v.*) . . 285
McSweeney *v.* Edison Electric Illuminating Co. . . 563
Maggelet's Case 57
Mahoney's Case 555
Mammott *v.* Worcester Consolidated Street Railway 282
Mansfield *v.* Secretary of the Commonwealth 262
Maran *v.* Peabody 432
Marchant *v.* Boston & Maine Railroad 472
Martin (Teague *v.*) 458
Massaletti *v.* Fitzroy . . . 487
Massasoit-Pocasset National Bank *v.* Borden 581
Maynes (Leavitt *v.*) . . . 350
——— (Richardson *v.*) . . 350
Mayor of Cambridge *v.* Cambridge 249
Medford National Bank (Boston Tow Boat Co. *v.*) 484
Meserve (Bruce *v.*) 463
Metropolitan Life Ins. Co. (McDonough *v.*) 450
Middlesex Mutual Fire Ins. Co. (Smith *v.*) 301
Missouri, Kansas & Texas Railway (Reynolds *v.*) . 584
Mitchell (Tod *v.*) 541
Moore (Murphy *v.*) 565
Morang (Chertok *v.*) . . . 598
Mulholland (Peoples National Bank *v.*) 152
Murch *v.* Clapp 569
Murphy *v.* Moore 565
Murray *v.* Cangiano . . . 435
——— *v.* Fiorentini . . . 466
Muskegat Island Club *v.* Prior 95

Negus *v.* Foote 375
Nelson (Williams *v.*) . . . 191
New England Telephone & Telegraph Co (Whalen *v.*) 361
New York Central & Hudson River Railroad *v.* Clarke 274
New York, New Haven, & Hartford Railroad (Gardner *v.*) 545
Nichols (Day *v.*) 236
Nickels *v.* Scholl 205
Nicksa (Hurnanen *v.*) . . . 346
Noyes *v.* Carr 339

O'Brien's Case (John) . . . 380
——— (William) 211
Old Colony Trust Co. (Day *v.*) 225
Orlov (Aronson *v.*) 1

Panell *v.* Rosa 594
Parkhurst *v.* Ginn 159

Parkhurst *v.* Treasurer & Receiver General 196
Parsons *v.* Lenox 231
Partridge *v.* Clary 290
Peabody (Brown *v.*) . . . 52
——— (Maran *v.*) 432
Penn Mutual Life Ins. Co. (Hayes *v.*) 122
Peoples National Bank *v.* Mulholland 152
People's Savings Bank (Societe de Bienfaisance St. Jean Baptiste de Millbury *v.*) 556
Philbrick *v.* Creed 382
Pitt *v.* Brouthers 298
Poli (Windt *v.*) 329
Pratt (Vinton *v.*) 468
Prior (Muskegat Island Club *v.*) 95
Public Service Commissioners (Fall River *v.*) . . 575

Regan *v.* Cummings . . . 414
Reynolds *v.* Missouri, Kansas & Texas Railway . . 584
Rich (Skerry *v.*) 462
Richardson *v.* Maynes . . 350
Riverbank Improvement Co. *v.* Chadwick 242
Robson *v.* Lyford 318
Rosa (Panell *v.*) 594
Rose *v.* Harrison 261
Ryan *v.* Annelin 591

St. Peter's Parish (Taber *v.*) 312
Sallinger (Doucette *v.*) . . 444
Sampson (State Street Trust Co. *v.*) 411
Scanlon *v.* United Cigar Stores Co. 481
Scholl (Nickels *v.*) 205
Seagrave (Holbrook *v.*) . . 26
Secretary of the Commonwealth (Mansfield *v.*) . . 262
Sherman *v.* Buffinton . . . 139
Skerry *v.* Rich 462
Smith *v.* Middlesex Mutual Fire Ins. Co. 301
Societe de Bienfaisance St. Jean Baptiste de Millbury *v.* People's Savings Bank 556
——— *v.* Worcester County Institution for Savings . 556
Somerville (Union Glass Co. *v.*) 202
State Street Trust Co. *v.* Sampson 411
Stevens, landowner . . . 368
Superior Court, Three Justices of the (Ashley *v.*) . 63

Taber *v.* St. Peter's Parish 312
Taylor *v.* Barton Child Co. 126
——— *v.* Kennedy 390
Teague *v.* Martin 458
Thorndike (Burns *v.*) . . . 552
Three Justices of the Superior Court (Ashley *v.*) . 63
Tod *v.* Mitchell 541
Treasurer & Receiver General (Parkhurst *v.*) . . . 196

Union Glass Co. *v.* Somerville 202
United Cigar Stores Co. (Scanlon *v.*) 481
United States Fidelity & Guaranty Co. (Barker *v.*). 421
Universal Optical Corp. *v.* Globe Optical Co. . . . 84
Uzzio's Case 331

Vannah *v.* Hart Private Hospital 132
Vinton *v.* Pratt 468

Welch *v.* Colt 511
Weston (Cogswell *v.*) . . . 219
Whalen *v.* New England Telephone & Telegraph Co. 361
Whiting *v.* Houghton . . . 429
Whitman *v.* Fournier . . . 93
——— *v.* Whitney 18
Whitney (Whitman *v.*) . . 18
Wilder (Leslie *v.*) 343
Willard *v.* Greenwood . . . 549
Williams *v.* Nelson 191

Windt *v.* Poli 329
Worcester Consolidated Street Railway (Bailey *v.*) 477
——— (Connors *v.*) . . . 357
——— (Hodgerney *v.*) . . 477
——— (Kerr *v.*) 281
——— (Mammott *v.*) . . . 282
Worcester County Institution for Savings (Societe de Bienfaisance St. Jean Baptiste de Millbury *v.*) 556
Zeuner (Holland *v.*) . . . 142

TABLE OF CASES

CITED BY THE COURT.

Abbott v. Bradstreet, 3 Allen, 587 412, 513
——— v. Gaskins, 181 Mass. 501 43
A. B. Farquhar Co. Ltd. v. National Harrow Co. 42 C. C. A. 600 11
Adams v. Acme White Lead & Color Works, 182 Mich. 157 62
——— v. Adams, 154 Mass. 290 605
——— v. Boston Elevated Railway, 214 Mass. 1 501
——— v. Lanadon, 18 Idaho, 483 82
——— v. Tozer, 163 App. Div. (N. Y.) 751 492
——— v. Wildes, 107 Mass. 123 157
Adriance, Platt & Co. v. National Harrow Co. 58 C. C. A. 163 11
Agawam Co. v. Jordan, 7 Wall. 583 5
Aldworth v. Lynn, 153 Mass. 53 57
Allard v. Hildreth, 173 Mass. 26 152
Allen v. Boardman, 193 Mass. 284 539
——— v. Pullman's Palace Car Co. 191 U. S. 171 115
——— v. Puritan Trust Co. 211 Mass. 409 561
——— v. Riley, 203 U. S. 347 7
Allin, Matter of, 224 Mass. 9 383
American Circular Loom Co. v. Wilson, 198 Mass. 182 5
American Express Co. v. United States Horse Shoe Co. 244 U. S. 58 125
American Malting Co. v. Souther Brewing Co. 194 Mass. 89 394, 419
American Stay Co. v. Delaney, 211 Mass. 229 5, 298
American Surety Co. of New York v. Vinton, 224 Mass. 337 222, 574
Ames v. Kansas, 111 U. S. 449 75
——— v. New York, New Haven, & Hartford Railroad, 221 Mass. 304 517
Amherst College v. Amherst, 193 Mass. 168 235
Anderson v. Boston Elevated Railway, 220 Mass. 28 100
Andros v. Andros, 24 Ch. D. 637 607
Anonymous, 9 Mod. 66 544
Archer v. Eldredge, 204 Mass. 323 284
Archibald v. Ott, 77 W. Va. 448 61
Arlington Board of Survey v. Bay State Street Railway, 224 Mass. 463 580
Arnold v. Maxwell, 223 Mass. 47 297
Ashley v. Ryan, 153 U. S. 436 110
Ashuelot Bank v. Pearson, 14 Gray, 521 583
Atchison, Topeka & Santa Fe Railway v. O'Connor, 223 U. S. 280 111
Athol Music Hall Co. v. Carey, 116 Mass. 471 180
Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268 561
Attorney General v. Electric Storage Battery Co. 188 Mass. 239 107, 122
——— v. Jochim, 99 Mich. 358 73
——— v. Sullivan, 163 Mass. 446 73
——— v. Tillinghast, 203 Mass. 539 81
——— v. Williams, 174 Mass. 476 248
Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409 527

Bagdon v. Philadelphia & Reading Coal & Iron Co. 217 N. Y. 432 590
Bailey v. Agawam National Bank, 190 Mass. 20 188, 246
——— v. Hervey, 135 Mass. 172 350
——— v. Marden, 193 Mass. 277 264
——— v. Wood, 211 Mass. 37 537
Baker v. Baker, 167 Mass. 575 24
Balch v. Stone, 149 Mass. 39 540
Balcom v. Haynes, 14 Allen, 204 345
Baldwin v. Wilbraham, 140 Mass. 459 194
Ball v. Allen, 216 Mass. 469 567
——— v. Holland, 189 Mass. 369 514
Baltic Mining Co. v. Commonwealth, 207 Mass. 381 107, 122
——— v. Massachusetts, 231 U. S. 68 107, 121
Bankers Mutual Casualty Co. v. Minneapolis, St. Paul & Sault Sainte Marie Railway, 192 U. S. 371 6
Bank of Brighton v. Smith, 5 Allen, 413 583
Bank of Missisippi v. Wrenn, 3 Sm. & M. 791 486

Banks v. Braman, 188 Mass. 367 501
Barber Asphalt Paving Co. v. Mullen, 220 Mass. 308 428
Barclay v. Boston, 167 Mass. 596 531
Barker v. Metropolitan Life Ins. Co. 198 Mass. 375 452
Barrow Steamship Co. v. Kane, 170 U. S. 100 588
Barry v. Smith, 191 Mass. 78 463
Bartlett v. Slater, 183 Mass. 152 438
——— v. ———, 211 Mass. 334 594
Barton v. Radclyffe, 149 Mass. 275 562
Bartoni's Case, 225 Mass. 349 337
Batchelder v. Home National Bank, 218 Mass. 420 440
Bauer v. International Waste Co. 201 Mass. 197 10, 592
Baxter v. Abbott, 7 Gray, 71 31
——— v. Boston & Maine Railroad, 217 Mass. 312 280
——— v. Treasurer & Receiver General, 209 Mass. 459 43
Beal v. South Devon Railway, 3 H. & C. 337 494
Beals v. Case, 138 Mass. 138 246
Bearce v. Bowker, 115 Mass. 129 217
Beard v. Klusmeier, 158 Ky. 153 493
Beauchamp v. Powley, 1 M. & Rob. 38 505
Beauregard v. Webb Granite & Construction Co. 160 Mass. 201 365
Beekman v. Marsters, 195 Mass. 205 11
Beers v. Jackman, 103 Mass. 192 378
Belknap v. Belknap, 5 Allen, 468 224
Bellis v. Bellis, 122 Mass. 414 97
Benedict v. Olson, 37 Minn. 431 574
Bennett v. Clemence, 6 Allen, 10 97
Berea College v. Kentucky, 211 U. S. 45 81
Bernabeo v. Kaulback, 226 Mass. 128 284
Berton v. Atlas Assurance Co. 203 Mass. 134 521
Berube v. Horton, 199 Mass. 421 364
Best v. Berry, 189 Mass. 510 316
Beyfus v. Lawley, [1903] A. C. 411 472
Bickford v. Boston & Lowell Railroad, 21 Pick. 109 85
Bierce v. Stocking, 11 Gray, 174 9
Bigwood v. Boston & Northern Street Railway, 209 Mass. 345 547
Binney v. Annan, 107 Mass. 94 7
Binns v. Dazey, 147 Ind. 536 605
Birch v. New York, 190 N. Y. 397 493
Bishop v. Schneider, 46 Mo. 472 210
Bittinger v. Baker, 29 Penn. St. 66 311
Black v. Funk, 93 Kans. 60 597
Blackburn v. Crawfords, 3 Wall. 175 597
Blake v. Pegram, 109 Mass. 541 224
——— v. Rogers, 210 Mass. 588 389
Blanchard v. Cooke, 144 Mass. 207 131
Blinn v. Dame, 207 Mass. 159 188
Bliss v. Negus, 8 Mass. 46 9
Blohm v. Boston Elevated Railway, 221 Mass. 390 331
Bloom's Case, 222 Mass. 434 37
Blount v. Wheeler, 199 Mass. 330 44
Blume v. Kimball, 222 Mass. 412 413, 514
Boccella v. Holt-Fairchild Co. 217 Mass. 161 330
Bogni v. Perotti, 224 Mass. 152 78, 190
Boone v. Citizens' Savings Bank, 84 N. Y. 83 229
Borgnis v. Falk Co. 147 Wis. 327 217
Bork v. Martin, 132 N. Y. 280 537
Boston v. Doyle, 184 Mass. 373 410
Boston & Worcester Railroad v. Old Colony Railroad, 12 Cush. 605 277
Boston Bar Association v. Casey, 211 Mass. 187 383
——— v. ———, 227 Mass. 46 383
——— v. Greenhood, 168 Mass. 169 383
Boston Diatite Co. v. Florence Manuf. Co. 114 Mass. 69 11
Boston Lodge Order of Elks v. Boston, 217 Mass. 176 304
Boston Rubber Shoe Co. v. Malden, 216 Mass. 508 35
Boston Safe Deposit & Trust Co. v. Blanchard, 196 Mass. 35 292, 412, 541
——— v. Collier, 222 Mass. 390 470
——— v. Nevin, 212 Mass. 232 514
Bosworth v. Stockbridge, 189 Mass. 266 22, 513
Bothwell v. Boston Elevated Railway, 215 Mass. 467 80
Boucher v. Salem Rebuilding Commission, 225 Mass. 18 375, 522
Boutlier v. Malden, 226 Mass. 479 493
Bowaman v. Reeve, Prec. Ch. 577 544
Bowen v. Phinney, 162 Mass. 593 188
Bowes v. Christian, 222 Mass. 359 393
Bowman v. Secular Society, Ltd. [1917] 1 A. C. 406 200
Boyden v. Hill, 198 Mass. 477 125
Brackett v. Commonwealth, 223 Mass. 119 204
Brandeis v. Atkins, 204 Mass. 471 43
Bremer v. Williams, 210 Mass. 256 562
Brennan v. Standard Oil Co. of New York, 187 Mass. 376 501
Brewster v. Seeger, 173 Mass. 281 228
Brick v. Bosworth, 162 Mass. 334 364
Bridge v. Bridge, 146 Mass. 373 170
Brien v. Commonwealth, 5 Met. 508 71
Brigham v. Boston & Albany Railroad, 102 Mass. 14 438
——— v. Clark, 100 Mass. 430 204
——— v. Este, 2 Pick. 420 430
——— v. Rogers, 17 Mass. 571 457
Brightman's Case, 220 Mass. 17 60
Brightman v. Bates, 175 Mass. 105 180

Brill v. St. Louis Car Co. 80 Fed. Rep. 909 9
Brilliant v. Samelas, 221 Mass. 302 147
Brimblecom v. Haven, 12 Cush. 511 171
Brinton's, Ltd. v. Turvey, [1905] A. C. 230 63
Brock v. Rogers, 184 Mass. 545 228
Brockett v. Bartholomew, 6 Met. 396 395
Bronson v. Coffin, 108 Mass. 175 277
Brooks v. Fitchburg & Leominster Street Railway, 200 Mass. 8 500
——— v. Holden, 175 Mass. 137 597
——— v. Twitchell, 182 Mass. 443 602
Brown's Case, 173 Mass. 498 77
———, 228 Mass. 31 217
Brown v. Duchesne, 19 How. 183 7
——— v. Dunham, 11 Gray, 42 229
——— v. Greenfield Life Association, 172 Mass. 498 453
——— v. Seymour, 1 Pick. 32 431
——— v. Thurston, 56 Maine, 126 311
——— v. Wright, 194 Mass. 540 292
Bruce v. Anderson, 176 Mass. 161 602
Brusseau v. New York, New Haven, & Hartford Railroad, 187 Mass. 84 452
Bryant v. Rich, 106 Mass. 180 137
——— v. Thompson, 128 N. Y. 426 46
Buck v. Dowley, 16 Gray, 555 218
Buldra v. Henin, 212 Mass. 275 509 n.
Bulkeley v. New York, New Haven, & Hartford Railroad, 216 Mass. 432 581
Bullard v. Boston Elevated Railway, 226 Mass. 262 480
Burden v. Thayer, 3 Met. 76 394
Burke v. Hodge, 211 Mass. 156 348
Burnham v. Boston & Maine Railroad, 227 Mass. 422 416
Bushnell v. Industrial Board of Illinois, 276 Ill. 262 217
Buswell v. Newcomb, 183 Mass. 111 26
Butler v. Gleason, 214 Mass. 248 30
Byam v. Bickford, 140 Mass. 31 97
Byrne v. Farnum, 188 Mass. 219 151

Caldwell v. Blanchard, 191 Mass. 489 306
Campbell v. Brown, 129 Mass. 23 535
Canfield v. Iowa Dairy Separator Co. 172 Iowa, 164 60
Canton Co-operative Bank v. American Central Ins. Co. 219 Mass. 132 305
Capen v. Leach, 182 Mass. 175 97
Carleton v. Bird, 94 Maine, 182 7
——— v. Rugg, 149 Mass. 550 75
Carpenter v. Pocasset Manuf. Co. 180 Mass. 130 392
Carr v. Leahy, 217 Mass. 438 229
Carriere v. Merrick Lumber Co. 203 Mass. 322 261, 364
Carroll's Case, 225 Mass. 203 37, 218
Carroll v. Boston Elevated Railway, 200 Mass. 527 204
——— v. ———, 210 Mass. 500 564
Carter v. Tanners Leather Co. 196 Mass. 163 543
Cary Library v. Bliss, 151 Mass. 364 410
Casavan v. Sage, 201 Mass. 547 448
Casey v. Smith, 152 Mass. 294 476
Cattley v. West, [1904] 2 Ch. 785 224
Cattus, In re, 106 C. C. A. 171 155
Central Trust Co. v. Kneeland, 138 U. S. 414 131
Century Throwing Co. v. Muller, 116 C. C. A. 614 155
Chaffee v. Sprague Manuf. Co. 14 R. I. 168 568
Chambless v. Vick, 34 Miss. 109 229
Chandler v. Thurston, 10 Pick. 205 311
——— v. Worcester Mutual Fire Ins. Co. 3 Cush. 328 498
Chapin v. Holyoke Young Men's Christian Association, 165 Mass. 280 507
Chapman v. Goodrich, 55 Vt. 354 228
Charham v. Bradford, 50 Ga. 327 210
Charland v. Home for Aged Women, 204 Mass. 563 444
Charlestown v. County Commissioners, 101 Mass. 87 234
Chase v. Boston, 193 Mass. 522 235
——— v. Perley, 148 Mass. 289 535
Cheesebrough v. Millard, 1 Johns. Ch. 409 543
Cheney v. Boston & Maine Railroad, 227 Mass. 336 280
——— v. Coughlin, 201 Mass. 204 70
Chertok v. Dix, 222 Mass. 226 570
——— v. Morang, 228 Mass. 598 583
Chick v. Nute, 176 Mass. 57 131
Childs v. Boston & Maine Railroad, 213 Mass. 91 188, 246
Churchill v. Palmer, 115 Mass. 310 522
Citizens Loan Association v. Boston & Maine Railroad, 196 Mass. 528 130
City National Bank v. Charles Baker Co. 180 Mass. 40 229
Claflin v. Claflin, 149 Mass. 19 293
——— v. Holmes, 202 Mass. 157 289
Clanton Bank v. Robinson, 195 Ala. 194 132
Clapp v. Ingraham, 126 Mass. 200 470
Clark v. Bonner, 217 Mass. 201 466
——— v. New England Mutual Fire Ins. Co. 6 Cush. 342 305
Clarke v. Treasurer & Receiver General, 226 Mass. 301 470
Cleveland v. Clap, 5 Mass. 201 431
Clifford v. Taylor, 204 Mass. 358 598
Coates v. Semper, 82 Minn. 460 597
Cobb v. Hale, 172 Mass. 387 262
Codman v. Bradley, 201 Mass. 361 246

Codman v. Brooks, 167 Mass. 499 541
Codwise v. Livermore, 194 Mass. 445 437
Coe, In re, 106 C. C. A. 181 155
Coggs v. Bernard, 2 Ld. Raym. 909 490
Cohen v. Ames, 205 Mass. 186 466
——— v. Longarini, 207 Mass. 556 419
Cohens v. Virginia, 6 Wheat. 264 109
Cole v. Tucker, 164 Mass. 486 77
Collins v. Casualty Co. of America, 224 Mass. 327 452
——— v. South Boston Railroad, 142 Mass. 301 476
Comerford's Case, 224 Mass. 571 318
Commercial National Bank v. Canal-Louisiana Bank & Trust Co. 239 U. S. 520 155
Commonwealth v. Anderson, 220 Mass. 142 354
——— v. Anthes, 5 Gray, 185 80
——— v. Atkins, 136 Mass. 160 548
——— v. Bean, 137 Mass. 570 379
——— v. Dolan, 121 Mass. 374 548
——— v. Eastman, 1 Cush. 189 353
——— v. Edgerly, 10 Allen, 184 353
——— v. Gray, 129 Mass. 474 378
——— v. Hayden, 211 Mass. 296 373
——— v. Kelley, 177 Mass. 221 209
——— v. Libbey, 216 Mass. 356 78, 190
——— v. Mackay, 177 Mass. 345 311
——— v. Martin, 162 Mass. 402 549
——— v. Montgomery, 11 Met. 534 272
——— v. Morrissey, 175 Mass. 264 378
——— v. Mulrey, 170 Mass. 103 272
——— v. National Contracting Co. 201 Mass. 248 264, 522
——— v. O'Connor, 107 Mass. 219 379
——— v. Perry, 155 Mass. 117 189
——— v. Petranich, 183 Mass. 217 81
——— v. Phelps, 210 Mass. 78 71
——— v. Reid, 175 Mass. 325 311
——— v. Strauss, 191 Mass. 545 190
——— v. Tay, 146 Mass. 146 548
——— v. Temple, 14 Gray, 69 367
——— v. Uhrig, 146 Mass. 132 269
——— v. Wentworth, 146 Mass. 36 268
Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602 588
Connecticut River Railroad v. County Commissioners, 127 Mass. 50 82
Conners v. Lowell, 209 Mass. 111 444
Connolly v. Bolster, 187 Mass. 266 186
Considine v. Metropolitan Life Ins. Co. 165 Mass. 462 187
Conway Tool Co. v. Hudson River Ins. Co. 12 Cush. 144 304
Cook v. Hinsdale, 4 Cush. 134 593
Cooley v. Collins, 186 Mass. 507 393
Copley v. New Haven & Northampton Co. 136 Mass. 6 501
Corby v. Hill, 4 C. B. (N. S.) 556 492
Corey v. Havener, 182 Mass. 250 592
Cormier v. Brock, 212 Mass. 292 588
Cornell v. Coyne, 192 U. S. 418 112
Cornell Steamboat Co. v. Sohmer, 235 U. S. 549 110
Corrigan v. Union Sugar Refinery, 98 Mass. 577 491
Cote v. New England Navigation Co. 213 Mass. 177 592
Coughlan v. Cambridge, 166 Mass. 268 364
——— v. Gillison, [1899] 1 Q. B. 145 495
County of Berkshire v. Cande, 222 Mass. 87 81
Cowden's Case, 225 Mass. 66 556
Cowden v. Jacobson, 165 Mass. 240 544
Cowen v. Kirby, 180 Mass. 504 484
Cox's Case, 225 Mass. 220 382
Cox v. American Agricultural Chemical Co. 24 R. I. 503 60
Coyle v. John Watson, Ltd. [1915] A. C. 1 60
Crafts v. Sikes, 4 Gray, 194 69
Crane Co. v. Looney, 218 Fed. Rep. 260 113
Crapo v. Pierce, 187 Mass. 141 408
——— v. Price, 190 Mass. 317 292
Crawford v. Langmaid, 171 Mass. 309 471
——— v. Nies, 224 Mass. 474 408
Crocker v. Cotting, 166 Mass. 183 55
——— v. ———, 173 Mass. 68 249
Crofut v. Layton, 68 Conn. 91 471
Cropper v. Gorham, 221 Mass. 119 131
Cummings v. Cummings, 146 Mass. 501 172
Cunningham v. Connecticut Fire Ins. Co. 200 Mass. 333 521
——— v. Mayor of Cambridge, 222 Mass. 574 79, 251
Cunnion, Matter of, 201 N. Y. 123 597
Curley v. Lynch, 206 Mass. 289 471
Curtis v. Lyman, 24 Vt. 338 210

Daggett v. Slack, 8 Met. 450 345
Dakin v. Savage, 172 Mass. 23 50
Dame v. C. H. Hanson & Co. Inc. 212 Mass. 124 350
Darrow v. Braman, 201 Mass. 469 574
Dartmouth v. County Commissioners, 153 Mass. 12 69
Dartnall v. Howard, 4 B. & C. 345 505
David v. Park, 103 Mass. 501 6
Davis v. Boston Elevated Railway, 222 Mass. 475 333
——— v. Central Congregational Society, 129 Mass. 367 507
——— v. New England Railway Publishing Co. 203 Mass. 470 11
Davison v. Maryland Casualty Co. 197 Mass. 167 186
Day v. Mills, 213 Mass. 585 155
——— v. Old Colony Trust Co. 228 Mass. 225 239

Dayton v. Adkisson, 18 Stew. 603 607
Dean v. American Legion of Honor, 156 Mass. 435 188
——— v. Boston Elevated Railway, 217 Mass. 495 453
Deane v. Caldwell, 127 Mass. 242 394
Deans v. Eldredge, 217 Mass. 583 230
Dearborn v. Ames, 8 Gray, 1 71
Debbins v. Old Colony Railroad, 154 Mass. 402 453, 501
Delaware, Lackawanna & Western Railroad v. Pennsylvania, 198 U. S. 341 526
Delaware Railroad Tax, 18 Wall. 206 110
Dennick v. Railroad Co. 103 U. S. 11 588
DeVeer v. Pierson, 222 Mass. 167 523
Devine v. New York, New Haven, & Hartford Railroad, 205 Mass. 416 501
Dewey v. Richardson, 206 Mass. 430 190
Dexter v. Inches, 147 Mass. 324 515
Diaz's Case, 217 Mass. 36 332
Dickinson, appellant, 152 Mass. 184 175
——— v. Boston, 188 Mass. 595 564
——— v. Hall, 14 Pick. 217 9
Diehl v. Totten, 32 No. Dak. 131 82
Dimauro v. Linwood Street Railway, 200 Mass. 147 501
Diman v. Swig, 223 Mass. 516 81
Dion v. Powers, 128 Mass. 192 86
Dix v. Old Colony Street Railway, 202 Mass. 518 509 n.
Dixon v. New England Railroad, 179 Mass. 242 564
Dodge v. Potter, 18 Barb. 193 210
Doe v. Boston & Worcester Street Railway, 195 Mass. 168 449
Doherty's Case, 222 Mass. 98 60
Doherty v. O'Callaghan, 157 Mass. 90 596
——— v. Phoenix Ins. Co. 224 Mass. 310 203
Dolphin v. Worcester Consolidated Street Railway, 189 Mass. 270 501
Domestic Telegraph & Telephone Co. v. Metropolitan Telephone Co. 12 Stew. 160 181
Donaghy v. Macy, 167 Mass. 178 251
Donahue v. County of Will, 100 Ill. 94 73
Donlan v. Provident Institution for Savings, 127 Mass. 183 560
Donovan v. Donovan, 223 Mass. 6 89
Dove v. Torr, 128 Mass. 38 413
Dow v. Doyle, 103 Mass. 489 289
Dowdell, petitioner, 169 Mass. 387 76
Downey v. Bay State Street Railway, 225 Mass. 281 350
——— v. Charles S. Gove Co. 201 Mass. 251 568
Downey v. H. P. Hood & Sons, 203 Mass. 4 56
Downing's Will, In re, 118 Wis. 581 597
Drommie v. Hogan, 153 Mass. 29 365
Dudley v. Keith, 153 Mass. 104 429
Duffee v. Call, 123 Mass. 318 429
Dugas v. Lawrence, 19 Ga. 557 130
Dulieu v. White, [1901] 2 K. B. 669 494
Dunbar v. Marder, 13 N. H. 311 7
Duncan v. Lawson, 41 Ch. D. 394 544
Dunham v. Holmes, 225 Mass. 68 30
Dunlap v. Bullard, 131 Mass. 161 395
Durgin v. Lowell, 3 Allen, 398 56
Durkin v. Cobleigh, 156 Mass. 108 458
Dutton v. Gerrish, 9 Cush. 89 457
Dwyer v. Boston Elevated Railway, 220 Mass. 193 359

Eagan v. Luby, 133 Mass. 543 130
Eager v. Whitney, 163 Mass. 463 292
Earle v. Angell, 157 Mass. 294 307
Edwards v. Edwards, 183 Mass. 581 170
——— v. Worcester, 172 Mass. 104 347
Eke v. Hart-Dyke, [1910] 2 K. B. 677 63
Elder v. Adams, 180 Mass. 303 43
——— v. Dwight Manuf. Co. 4 Gray, 201 217
Electric Welding Co. Ltd. v. Prince, 200 Mass. 386 264, 522
Elliot v. Hayes, 8 Gray, 164 471
Elmore v. Symonds, 183 Mass. 321 132
Emerson v. Somerville, 166 Mass. 115 181
Emery v. Boston & Maine Railroad, 173 Mass. 136 453, 501
Ensign v. Faxon, 224 Mass. 145 46, 239
Epstein v. Dunbar, 221 Mass. 579 50
Essex Trust Co. v. Enwright, 214 Mass. 507 5
Evans v. Foss, 194 Mass. 513 246
Evensen v. Lexington & Boston Street Railway, 187 Mass. 77 501
E. W. Burt & Co. Inc. v. Coes & Young Co. 212 Mass. 134 568
Ewing v. Filley, 43 Penn. St. 384 72
Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282 6

Fairbanks v. Boston Storage Warehouse Co. 189 Mass. 419 138
Fall River v. Aetna Ins. Co. 219 Mass. 454 453
Fargo v. Hart, 193 U. S. 490 115
Farley v. Thompson, 15 Mass. 18 394
Farmers' Loan & Trust Co., Matter of, 213 N. Y. 168 515
——— v. Mortimer, 219 N. Y. 290 471
Farmington River Water Power Co. v. County Commissioners, 112 Mass. 206 16
Farr v. Rouillard, 172 Mass. 303 583
Farrar v. Smith, 64 Maine, 74 130

Farrigan v. Pevear, 193 Mass. 147 463
Farwell v. Bigelow, 112 Mich. 285 544
Fay v. Sears, 111 Mass. 154 85
Fearing v. Kimball, 4 Allen, 125 353
Federal Trust Co. v. Bristol County Street Railway, 222 Mass. 35 130, 350
Fell's Case, 226 Mass. 380 235
Fennell v. Peterson, 225 Mass. 598 461
Fierro's Case, 223 Mass. 378 217
Finnish Temperance Society Sovittaja v. Raivaaja Publishing Co. 219 Mass. 28 11
Fisher's Case, 220 Mass. 581 60
Fitz v. Comey, 118 Mass. 100 457
Fitzjarrell v. Boyd, 123 Md. 497 493
Fitzmaurice v. New York, New Haven, & Hartford Railroad, 192 Mass. 159 501
Fitzpatrick v. Gilson, 176 Mass. 477 147, 465
Fleming v. Buchanan, 3 De G., M. & G. 976 472
Flint v. Stone Tracy Co. 220 U. S. 107 109
Flynn v. Coolidge, 188 Mass. 214 564
Fogg v. Price, 145 Mass. 513 181
Follins v. Dill, 221 Mass. 93 435
Foote v. Cotting, 195 Mass. 55 562
Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175 10
Fossler v. Schriber, 38 Ill. 172 597
Foster v. Essex Bank, 17 Mass. 479 490
——— v. Hall, 12 Pick. 89 596
Fottler v. Moseley, 185 Mass. 563 447
Fowler v. Fowler, 131 N. C. 169 607
Fox v. Peninsular White Lead & Color Works, 84 Mich. 676 60
Francis v. Rosa, 151 Mass. 532 379
Frati v. Jannini, 226 Mass. 430 523
Frazee v. Nelson, 179 Mass. 456 389
Freke v. Lord Carbery, L. R. 16 Eq. 461 544
French v. Goodnow, 175 Mass. 451 584
Friedenwald Co. v. Warren, 195 Mass. 432 230, 573
Frost v. Jacobs, 204 Mass. 1 55
Frothingham v. Shaw, 175 Mass. 59 236

Gahagan v. Boston & Lowell Railroad, 1 Allen, 187 255
Gahm v. Wallace, 206 Mass. 39 588
Galbraith v. West End Street Railway, 165 Mass. 572 501
Gallagher v. Murphy, 221 Mass. 363 435
Gannett v. Cambridge, 218 Mass. 60 233
Garabedian v. Worcester Consolidated Street Railway, 225 Mass. 65 477
Gardiner v. Treasurer & Receiver General, 225 Mass. 355 470
Garvey v. Lowell, 199 Mass. 47 16
Gayler v. Wilder, 10 How. 477 7
Gentile v. Boston Elevated Railway, 217 Mass. 113 137
German Alliance Ins. Co. v. Home Water Supply Co. 226 U. S. 220 188
Giblin v. McMullen, L. R. 2 P. C. 317 494
Gifford v. Choate, 100 Mass. 343 289
Gilbert v. Bachelder, 223 Mass. 329 289
Gilbreth v. Brown, 15 Mass. 178 430
Gill v. Middleton, 105 Mass. 477 499
Gillen's Case, 215 Mass. 96 337
Gilson v. Nesson, 208 Mass. 368 230
Ginn v. Almy, 212 Mass. 486 297
Glackin v. Bennett, 226 Mass. 316 457
Glasgow Coal Co. Ltd. v. Welsh, [1916] 2 A. C. 1 60
Gleason v. Nelson, 162 Mass. 245 343
Glidden v. United States Fidelity & Guaranty Co. 198 Mass. 109 564
Glover v. Patten, 165 U. S. 394 597
Golding v. Brennan, 183 Mass. 286 427
Gold Issue Mining & Milling Co. v. Pennsylvania Fire Ins. Co. 267 Mo. 524 590
Goldrick v. Bristol County Savings Bank, 123 Mass. 320 560
Goldstein v. Conner, 212 Mass. 57 373
Goodman's Trusts, In re, 17 Ch. D. 266 607
Gorski's Case, 227 Mass. 456 218
Gould's Case, 215 Mass. 480 150, 190
Gove's Case, 223 Mass. 187 337
Grace v. Denison, 114 Mass. 16 181
Graffam v. Pierce, 143 Mass. 386 536
Graham v. Middleby, 185 Mass. 349 601
——— v. Pocasset Manuf. Co. 220 Mass. 195 484
——— v. Roberts, 200 Mass. 152 77
Gray v. Farmers' National Bank, 81 Md. 631 574
——— v. Lenox, 215 Mass. 598 236
——— v. McLendon, 123 Ga. 224 73
——— v. Thrasher, 104 Mass. 373 85
Great Barrington v. County Commissioners, 112 Mass. 218 17, 235
Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532 190
Green v. Garrington, 16 Ohio St. 548 210
——— v. Gaskill, 175 Mass. 265 230
——— v. Wilson, 6 C. E. Green, 211 7
Greene v. Corey, 210 Mass. 536 426
Greenough v. Gaskell, 1 Myl. & K. 98 596
Grey's Trusts, In re, [1892] 3 Ch. 88 607
Griffin v. Kelleher, 132 Mass. 82 573
Grill v. General Iron Screw Colliery Co. L. R. 1 C. P. 600 494

Grimshaw v. Lake Shore & Michigan Southern Railway, 205 N. Y. 371 492
Guaranty Co. v. Pressed Brick Co. 191 U. S. 416 428
Guild v. Butler, 127 Mass. 386 573
Guinn v. United States, 238 U. S. 347 81

Hadley v. Heywood, 121 Mass. 236 377
Hairston v. Danville & Western Railway, 208 U. S. 598 247
Hall v. Cogswell, 183 Mass. 521 172
——— v. Hall, 140 Mass. 267 515
——— v. ——, 200 Mass. 194 583
——— v. Jackson, 20 Pick. 194 131
Hamilton Co. v. Massachusetts, 6 Wall. 632 113
Hamlen v. Keith, 171 Mass. 77 55
Hammond v. Thompson, 168 Mass. 531 395
Hanscom v. Malden & Melrose Gas Light Co. 220 Mass. 1 190
Harmon v. Sweet, 221 Mass. 587 521
——— v. Weston, 215 Mass. 242 222, 471
Harriman v. Woburn Electric Light Co. 163 Mass. 85 131
Harris v. Perry & Co. [1903] 2 K. B. 219 502
——— v. Truman, 7 Q. B. D. 340 158
Harrison, Ex parte, 212 Mo. 88 82
Hart v. Cole, 156 Mass. 475 508
——— v. Ten Eyck, 2 Johns. Ch. 108 158
Hartford v. New York, New Haven, & Hartford Railroad, 184 Mass. 365 507
Hartt v. Rueter, 223 Mass. 207 247
Harvard College v. Society for Promoting Theological Education, 3 Gray, 280 410
Harvey v. Squire, 217 Mass. 411 551
Haskell v. Blair, 3 Cush. 534 130
Hastings v. Nesmith, 188 Mass. 190 43
Hathaway v. Congregation Ohab Shalom, 216 Mass. 539 63
Hatton v. Robinson, 14 Pick. 416 596
Hawkes v. Lackey, 207 Mass. 424 12
Hawkins v. Roberts & Son, 122 Ala. 130 73
Hayes v. Milford Mutual Fire Ins. Co. 170 Mass. 492 305
——— v. Missouri, 120 U. S. 68 80
——— v. Penn Mutual Life Ins. Co. 222 Mass. 382 124
——— v. Ward, 4 Johns. Ch. 123 574
Hayne v. Union Street Railway, 189 Mass. 551 137
Hays v. Pacific Mail Steamship Co. 17 How. 596 526
Heard v. Read, 169 Mass. 216 292
Heath v. New Bedford Safe Deposit & Trust Co. 184 Mass. 481 559
Hellen v. Medford, 188 Mass. 42 249
Hemenway v. Milton, 217 Mass. 230 236
Henry v. A. B. Dick Co. 224 U. S. 1 6
——— v. Estey, 13 Gray, 336 467
Henry N. Clark Co. v. Skelton, 208 Mass. 284 210
Herlihy v. Smith, 116 Mass. 265 461
Hervey v. Rhode Island Locomotive Works, 96 U. S. 664 350
Hewitt's Case, 225 Mass. 1 382
Hewitt v. Hayes, 205 Mass. 356 158
Hey v. Prime, 197 Mass. 474 196
Heywood v. Ogasapian, 224 Mass. 203 460
H. G. Kilbourne Co. v. Standard Stamp Affixer Co. 216 Mass. 118 89
Hibernia Building Association v. McGrath, 154 Penn. St. 296 502
Hickey v. Worcester, 213 Mass. 125 152
Hill v. Bowers, 120 Mass. 135 345
——— v. Moors, 224 Mass. 163 171
Hillier v. Farrell, 185 Mass. 434 54
Hills v. Barnard, 152 Mass. 67 515
——— v. Simonds, 125 Mass. 536 513
Hittinger Fruit Co. v. Cambridge, 218 Mass. 220 158
Hogan v. Collins, 183 Mass. 43 17
Holden v. Metropolitan Life Ins. Co. 188 Mass. 213 453
Holland v. Adams, 3 Gray, 188 515
Holmes v. Taber, 9 Allen, 246 170
Holroyd v. Marshall, 10 H. L. Cas. 191 131
Holyoke v. Holyoke, 110 Maine, 469 597
Home Ins. Co. v. New York, 134 U. S. 594 109
Hooe v. Boston & Northern Street Railway, 187 Mass. 67 151
Hooper v. Cuneo, 227 Mass. 37 551
Hoover v. Jones, 84 Neb. 662 584
Hopkins v. O'Leary, 176 Mass. 259 151
——— v. United States, 171 U. S. 578 112
Horn Silver Mining Co. v. New York, 143 U. S. 305 108
Horton v. Robinson, 212 Mass. 248 239
Houghton v. Dickinson, 196 Mass. 389 605
——— v. Kendall, 7 Allen, 72 539
Howe v. Grimes, 211 Mass. 33 583
Howland v. Vincent, 10 Met. 371 340
Hudson v. Lynn & Boston Railroad, 185 Mass. 510 500
——— v. Roxbury Institution for Savings, 176 Mass. 522 560
Hudson Real Estate Co. v. Tower, 156 Mass. 82 181
Hunt v. Holston, 185 Mass. 137 444
——— v. Mann, 132 Mass. 53 388
——— v. Thompson, 2 Allen, 341 395
Hunting v. Downer, 151 Mass. 275 95

Huntress v. Burbank, 111 Mass. 213 584
Huntsman v. Fish, 36 Minn. 148 229
Hurle's Case, 217 Mass. 223 60
Hussey v. Arnold, 185 Mass. 202 386
Hutchinson v. Plant, 218 Mass. 148 465
Huxen's Case, 226 Mass. 292 144
Hyde v. Boston, 186 Mass. 115 360
——— v. Boston Elevated Railway, 186 Mass. 115 359
Hyde Park v. Wiggin, 157 Mass. 94 82

Igo v. Cambridge, 208 Mass. 571 368
Illinois Central Railroad v. Mississippi Railroad Commission, 229 Fed. Rep. 248 115
——— v. Tronstine & Co. 64 Miss. 834 502
Ilsley v. Stubbs, 5 Mass. 280 430
Indianapolis & St. Louis Railroad v. Horst, 93 U. S. 291 496
Industrial Commission of Ohio v. Brown, 92 Ohio St. 309 62
Ingalls v. Newhall, 139 Mass. 268 97
International Text Book Co. v. Martin, 221 Mass. 1 453
——— v. Pigg, 217 U. S. 91 81
Irving v. Ford, 183 Mass. 448 605
Isele v. Arlington Five Cents Savings Bank, 135 Mass. 142 249

Jackson v. Jackson, 153 Mass. 374 515
——— v. Massachusetts Mutual Fire Ins. Co. 23 Pick. 418 305
——— v. Old Colony Street Railway, 206 Mass. 477 137
——— v. Phillips, 14 Allen, 539 199, 408
——— v. Stevenson, 156 Mass. 496 247
Jacobs v. Saperstein, 225 Mass. 300 441
Jeffrey Manuf. Co. v. Blagg, 235 U. S. 571 115
Jenkins v. Bacon, 111 Mass. 373 500
Jennings v. Rooney, 183 Mass. 577 204
——— v. Tisbury, 5 Gray, 73 56
——— v. Wall, 217 Mass. 278 230, 353
Jewett v. Jewett, 200 Mass. 310 413
J. J. McCaskill Co. v. United States, 216 U. S. 504 180
Jochumsen v. Suffolk Savings Bank, 3 Allen, 87 217, 560
John A. Tolman & Co. v. Chicago, 24 L. R. A. (N. S.) 97 368
John Hetherington & Sons, Ltd. v. William Firth Co. 212 Mass. 257 524
John P. Squire & Co. v. Tellier, 185 Mass. 18 190
Johns v. Charles, 105 Mass. 262 130
Johnson's Case, 217 Mass. 388 38, 60
Johnson v. Foster, 221 Mass. 248 565
——— v. Holland, 211 Mass. 363 465
——— v. New York, New Haven, & Hartford Railroad, 217 Mass. 203 125
Johnson v. Trade Ins. Co. 132 Mass. 432 588
Jolliffe v. Higgins, 6 Munf. 3 228
Jones v. Atchison, Topeka, & Santa Fe Railroad, 150 Mass. 304 175
——— v. Great Southern Fireproof Hotel Co. 30 C. C. A. 108 190
——— v. Housatonic Railroad, 107 Mass. 261 367
——— v. Richardson, 10 Met. 481 129
Jordan v. Carberry, 185 Mass. 181 268
——— v. Jordan, 192 Mass. 337 170
Joyce v. Exeter, Hampton & Amesbury Street Railway, 190 Mass. 304 368
Judd v. Fargo, 107 Mass. 264 368

Kansas v. Ziebold, 123 U. S. 623 75
Kansas City, Fort Scott & Memphis Railway v. Kansas, 240 U. S. 227 109, 122
Kansas City, Memphis & Birmingham Railroad v. Stiles, 242 U. S. 111 110, 122
Karavias v. Gallinocos, 143 L. T. 237 506
Karrick v. Wetmore, 210 Mass. 578 63
Keating v. Boston Elevated Railway, 209 Mass. 278 196
Keay v. Goodwin, 16 Mass. 1 97
Keepers v. Fleitmann, 213 Mass. 210 350
Kelley's Case, 222 Mass. 538 556
Kelsall v. New York, New Haven, & Hartford Railroad, 196 Mass. 554 452
Kennedy v. Hub Manuf. Co. 221 Mass. 136 447
——— v. Welch, 196 Mass. 592 287
Kent v. Dunham, 106 Mass. 586 174, 289
Kern v. Kern, 154 Ind. 29 597
Kerr v. Crane, 212 Mass. 224 130
Kerrigan v. Commercial Brewing Co. 216 Mass. 306 453
Keystone Watch Case Co. v. Commonwealth, 212 Mass. 50 107
Kidd v. Pearson, 128 U. S. 1 112
Kidder v. United Order of the Golden Cross, 192 Mass. 326 453
Kilgour v. Gratto, 224 Mass. 78 375
Kimins v. Boston Five Cents Savings Bank, 141 Mass. 33 560
Kingsley v. Whitman Savings Bank, 182 Mass. 252 560
Kinneen v. Wells, 144 Mass. 497 73
Kirk v. United States, 163 U. S. 49 7
Knapp v. Windsor, 6 Cush. 156 539
Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197 187
Koontz v. Baltimore & Ohio Railroad, 220 Mass. 285 85

Labaree v. Colby, 99 Mass. 559 306
LaFond v. Boston & Maine Railroad, 208 Mass. 451 452
Laighton v. Brookline Trust Co. 225 Mass. 458 228
Lanci v. Boston Elevated Railway, 197 Mass. 32 501
Langmaid v. Reed, 159 Mass. 409 194
Lasley v. Delano, 139 Mich. 602 537
Layman's Will, 40 Minn. 371 597
Leach v. Fobes, 11 Gray, 506 44
Leahy v. Standard Oil Co. of New York, 224 Mass. 352 448
Leary v. William G. Webber Co. 210 Mass. 68 452
Leavitt v. Maykel, 210 Mass. 55 392
Lee v. Gorham, 165 Mass. 130 350
——— v. Prudential Life Ins. Co. 203 Mass. 299 454
Leland v. Barber, 228 Mass. 144 465
Lemieux v. Boston & Maine Railroad, 219 Mass. 399 150
Leonard v. Haworth, 171 Mass. 496 539
Lester v. Palmer, 4 Allen, 145 9
Leverett v. Barnwell, 214 Mass. 105 129, 172
Levins v. New York, New Haven, & Hartford Railroad, 183 Mass. 175 137
Levy v. M'Cartee, 6 Pet. 102 539
Lewis v. United States, 92 U. S. 618 543
Leyland v. Leyland, 186 Mass. 420 467
Lindenbaum v. New York, New Haven, & Hartford Railroad, 197 Mass. 314 453
Lindley v. Union Ins. Co. 65 Maine, 368 305
Linscott v. Trowbridge, 224 Mass. 108 514
Linton v. Hurley, 14 Gray, 191 461
Linzee v. Mixer, 101 Mass. 512 246
Liondale Bleach, Dye & Paint Works v. Riker, 56 Vroom, 426 63
Lipsky v. Heller, 199 Mass. 310 54
Little v. Massachusetts Northeastern Street Railway, 223 Mass. 501 518
Lizotte v. New York Central & Hudson River Railroad, 196 Mass. 519 255
Lochhead v. Jensen, 42 Utah, 99 493
Locomobile Co. of America v. Commonwealth, 218 Mass. 558 121
Lodge v. Swampscott, 216 Mass. 260 246
Loftus v. Pelletier, 223 Mass. 63 510
Logan v. Brown, 20 Okla. 334 537
Lombard v. Morse, 155 Mass. 136 228
——— v. Willis, 147 Mass. 13 514
Lopes v. Connolly, 210 Mass. 487 447
Lorando v. Gethro, 228 Mass. 181 193
Lord v. Wakefield, 185 Mass. 214 364
Loring v. Alline, 9 Cush. 68 229
——— v. Carnes, 148 Mass. 223 514
——— v. Hildreth, 170 Mass. 328 249
——— v. Thorndike, 5 Allen, 257 605
——— v. Wise, 226 Mass. 231 239
Low v. Pew, 108 Mass. 347 130
Lowe v. Jones, 192 Mass. 94 158
Lowell v. Boston, 111 Mass. 454 247
——— v. County Commissioners, 146 Mass. 403 17
Lufkin v. Jakeman, 188 Mass. 528 568
Lyford v. Boston & Maine Railroad, 227 Mass. 10 547
Lyman v. Lyman, 133 Mass. 414 536
Lynch v. Allyn, 160 Mass. 248 364
——— v. Chase, 55 Kans. 367 72
Lyon v. Cambridge, 136 Mass. 419 533
Lyons v. Urgalones, 189 Mass. 424 387

McArthur v. Scott, 113 U. S. 340 513
McCarthy v. Henderson, 138 Mass. 310 350
M'Carty v. Blevins, 5 Yerger, 195 130
McCarty v. Cosgrove, 101 Mass. 124 289
McCormack v. Boston Elevated Railway, 188 Mass. 342 367
McCue v. Boston Elevated Railway, 221 Mass. 432 354
McCulloch v. Needham, 217 Mass. 227 547
McCusker v. Geiger, 195 Mass. 46 287
McDonald v. Massachusetts General Hospital, 120 Mass. 432 507
McDonough v. Metropolitan Life Ins. Co. 228 Mass. 450 598
MacFarlane v. Boston Elevated Railway, 194 Mass. 183 360
M'Gee v. Barber, 14 Pick. 212 85
McGlue v. County Commissioners, 225 Mass. 59 82, 115
McGonigle v. Belleisle, 186 Mass. 310 354
McIntire v. Mower, 204 Mass. 233 224
——— v. Roberts, 149 Mass. 450 340
McKinney v. Jones, 55 Wis. 39 228
McLean's Case, 223 Mass. 342 37, 218
McLean v. Curran, 133 Mass. 531 230
——— v. Dean, 66 Minn. 369 228
McLeod v. Rawson, 215 Mass. 257 509 n.
McNeil v. Ames, 120 Mass. 481 395
——— v. Kendall, 128 Mass. 245 395
McNicol's Case, 215 Mass. 497 38, 217, 334
McNulty v. Cambridge, 130 Mass. 275 533
McPhee's Case, 222 Mass. 1 60
McPhee v. Scully, 163 Mass. 216 364
Macauley, In re, 158 Fed. Rep. 322 131
Mackin v. Detroit-Timkin Axle Co. 187 Mich. 8 217
Madden's Case, 222 Mass. 487 60, 196

Madisonville Traction Co. v. Saint Bernard Traction Co. 196 U. S. 239 247
Mahoney v. Healy, 10 Del. Ch. 311 597
Maine v. Grand Trunk Railway, 142 U. S. 217 113
Maine Shore Line Railroad v. Maine Central Railroad, 92 Maine, 476 486
Maionica v. Piscopo, 217 Mass. 324 393
Mallett v. North Carolina, 181 U. S. 589 80
Maney v. Providence & Worcester Railroad, 161 Mass. 283 209
Mann v. Brewer, 7 Allen, 202 522
Manning v. Conway, 192 Mass. 122 501
Mansfield v. Secretary of the Commonwealth, 228 Mass. 262 522
Marana v. McDonough, 212 Mass. 189 151
Marchant v. Pennsylvania Railroad, 153 U. S. 380 80
Marconi Wireless Telegraph Co. of America v. Commonwealth, 218 Mass. 558 107
Marcus v. Dyer, 174 Mass. 64 241
Marsal v. Hickey, 225 Mass. 170 461
Marsh v. Hoyt, 161 Mass. 459 515
——— v. Nichols, Shepard & Co. 128 U. S. 605 7
——— v. Woodbury, 1 Met. 436 131
Marsters v. Cling, 163 Mass. 477 394
Marston v. Reynolds, 211 Mass. 590 434
Martin v. Barnes, 214 Mass. 29 241
——— v. Boston & Northern Street Railway, 205 Mass. 16 507
——— v. Holgate, L. R. 1 H. L. 175 515
——— v. Meles, 179 Mass. 114 180
Marwedel v. Cook, 154 Mass. 235 435
Mason v. Lewis, 115 Mass. 334 437
——— v. State, 58 Ohio St. 30 73
Massachusetts Institute of Technology v. Boston Society of Natural History, 218 Mass. 189 247
Massachusetts Society for the Prevention of Cruelty to Animals v. Boston, 142 Mass. 24 199
Massell v. Boston Elevated Railway, 191 Mass. 491 489
Mathews v. Colburn, 215 Mass. 571 9
May v. May, 109 Mass. 252 241
——— v. Skinner, 152 Mass. 328 239
Mayberry v. Sivey, 18 Kans. 291 490
Mayor & Aldermen of Worcester v. Worcester Consolidated Street Railway, 192 Mass. 106 578
Mayor of Somerville v. Justices of the Police Court, 220 Mass. 393 82
Mead v. Strauss, 202 Mass. 399 341
Mendon v. County Commissioners, 5 Allen, 13 17
Menut v. Boston & Maine Railroad, 207 Mass. 12 277
Merriam v. Simonds, 121 Mass. 198 513
Merserole v. Libby, 6 Blatchf. 356 7
Michigan Central Railroad v. Carrow, 73 Ill. 348 502
Middletown Trust Co. v. Crowell, 89 Conn. 290 597
Miller v. American Steel & Wire Co. 99 Conn. 349 63
——— v. Horton, 152 Mass. 540 373
——— v. Miller, 91 N. Y. 315 607
Mills v. Potter, 189 Mass. 238 180
Milwaukee & St. Paul Railway v. Arms, 91 U. S. 489 496
Minnesota v. Northern Securities Co. 194 U. S. 48 6
Minor v. Happersett, 21 Wall. 162 81
Minot v. Purrington, 190 Mass. 336 26
——— v. Tappan, 122 Mass. 535 513
——— v. Treasurer & Receiver General, 207 Mass. 588 470
——— v. Winthrop, 162 Mass. 113 170
Mitchell v. Worcester, 129 Mass. 525 533
Moffatt v. Bateman, L. R. 3 P. C. 115 495
——— v. Kenny, 174 Mass. 311 56, 340
Molly Varnum Chapter, D. A. R. v. Lowell, 204 Mass. 487 199
Monson v. Palmer, 8 Allen, 551 605
Montague v. Gay, 17 Mass. 438 395
Montana Co. v. St. Louis Mining & Milling Co. 152 U. S. 160 80
Moody v. Wright, 13 Met. 17 129
Moore v. Saxton, 90 Conn. 164 607
——— v. Strickling, 46 W. Va. 515 73
Moors v. Drury, 186 Mass. 424 155
Moreton v. Hardern, 4 B. & C. 223 461
——— v. ———, Dowl. & Ry. 275 461
Morey v. Gloucester Street Railway, 171 Mass. 165 501
Morgan v. Parham, 16 Wall. 471 527
Morison v. Moat, 9 Hare, 241 6
Morong v. Spofford, 218 Mass. 50 484
Morris v. Whipple, 183 Mass. 27 367
Morse v. Hayden, 82 Maine, 227 539
Mosher v. Murphy, 121 Mass. 276 583
Moyer v. Bray, 227 Mass. 303 230
Moynihan v. Todd, 188 Mass. 301 463
Mullins v. New York, New Haven, & Hartford Railroad, 201 Mass. 38 507
Mulvey v. Boston, 197 Mass. 178 196
Mund v. Rehaume, 51 Col. 129 607
Munroe v. Holmes, 9 Allen, 244 239
——— v. ———, 13 Allen, 109 239
Murphy's Case, 224 Mass. 592 556
———, 226 Mass. 60 37
Murray v. Cangiano, 228 Mass. 435 467
——— v. Champernowne, [1901] 2 Ir. R. 232 544
——— v. Wood, 144 Mass. 195 230

Mutual Life Ins. Co. v. Everett, 13 Stew. 345 472
Mutual Loan Co. v. Martell, 200 Mass. 482 190
Myers v. Anderson, 238 U. S. 368 81
——— v. Turner, 17 Ill. 179 7

Nash v. Lull, 102 Mass. 60 7
National Bank v. Colby, 21 Wall. 609 486
——— v. Insurance Co. 104 U. S. 54 158
National Fertilizer Co. v. Fall River Five Cents Savings Bank, 196 Mass. 458 10
Naumberg v. Young, 15 Vroom, 331 458
Neafsey v. Chincholo, 225 Mass. 12 43
Nesbit v. Cande, 206 Mass. 437 45
Newark v. Stout, 23 Vroom, 35 574
Newburyport Institution for Savings v. Puffer, 201 Mass. 41 10
Newell v. Hadley, 206 Mass. 335 562
——— v. Peaslee, 151 Mass. 601 544
New England & Savannah Steamship Co. v. Commonwealth, 195 Mass. 385 526
Newton v. Rice, 118 Mass. 417 583
——— v. Seaman's Friend Society, 130 Mass. 91 316
New York Life Ins. Co. v. Hardison, 199 Mass. 190 187, 373
Niland v. Boston Elevated Railway, 208 Mass. 476 454
Noble v. Brooks, 224 Mass. 288 395
Nolin v. Pearson, 191 Mass. 283 377
Nolton v. Western Railroad, 15 N. Y. 444 490
North America Cold Storage Co. v. Chicago, 211 U. S. 306 373
Northampton v. Smith, 11 Met. 390 46
Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308 305
Northern Pacific Railway v. Adams, 192 U. S. 440 496
Norton v. Clark, 253 Ill. 557 597
Noxon v. DeWolf, 10 Gray, 343 94
Noyes v. Caldwell, 216 Mass. 525 280

O'Brien v. Lewis, 208 Mass. 515 26
——— v. Nute-Hallett Co. 177 Mass. 422 364
——— v. Shea, 208 Mass. 528 568
——— v. Spalding, 102 Ga. 490 597
——— v. Union Freight Railroad, 209 Mass. 449 340
Ocampo v. United States, 234 U. S. 91 80
Ogden v. Allen, 225 Mass. 595 170
——— v. Aspinwall, 220 Mass. 100 447
O'Grady v. Wilmot, [1916] 2 A. C. 231 470
Oklahoma, Ex parte, 220 U. S. 191 82
——— v. Wells, Fargo & Co. 223 U. S. 298 111
Old Dominion Steamship Co. v. Virginia, 198 U. S. 299 527
Old Wayne Mutual Life Association v. McDonough, 204 U. S. 8 589
O'Linda v. Lothrop, 21 Pick. 292 55
Oliver v. Washington Mills, 11 Allen, 268 78
——— v. Worcester, 102 Mass. 489 492
Olivieri v. Atkinson, 168 Mass. 28 523
Olmstead v. Latimer, 158 N. Y. 313 428
Onset Street Railway v. County Commissioners, 154 Mass. 395 17
Opinion of the Justices, 7 Mass. 523 77
———, 138 Mass. 601 79
———, 204 Mass. 607 247
———, 209 Mass. 606 217
———, 211 Mass. 624 247
Osborn v. Danvers, 6 Pick. 98 235
Otis v. Von Storch, 15 R. I. 41 574
Otis Co. v. Ludlow Manuf. Co. 201 U. S. 140 249

Pacific National Bank v. Windram, 133 Mass. 175 388
Page v. Monks, 5 Gray, 492 536
Paine, petitioner, 176 Mass. 242 541
Palairet's Appeal, 67 Penn. St. 479 247
Palmer v. Hampden, 182 Mass. 511 523
Panasuk's Case, 217 Mass. 589 144, 259
Parker v. Ames, 121 Mass. 220 170
——— v. Bell, 7 Gray, 429 188
——— v. Cobe, 208 Mass. 260 289
——— v. New England Trust Co. 215 Mass. 226 45
——— v. Nightingale, 6 Allen, 341 246
Parkhurst v. Treasurer & Receiver General, 228 Mass. 196 170
Parsons v. Winslow, 16 Mass. 361 224
Patnode v. Foote, 153 App. Div. (N. Y.) 494 490
Patten v. Deshon, 1 Gray, 325 395
Patterson v. Lawrence, 83 Ga. 703 472
Peabody v. Cook, 201 Mass. 218 412
——— v. New York, New Haven, & Hartford Railroad, 187 Mass. 489 204
——— v. Norfolk, 98 Mass. 452 5
——— v. North, 161 Mass. 525 229
Peach v. Bruno, 224 Mass. 447 318
Pearlstein v. New York, New Haven, & Hartford Railroad, 192 Mass. 20 501
Peck v. Conway 119 Mass. 546 246
Pecott's Case, 223 Mass. 546 144, 259
Pells v. Webquish, 129 Mass. 469 204
Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181 108
Penhallow v. Dwight, 7 Mass. 34 311
Pennell v. Lothrop, 191 Mass. 357 180

Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co. 243 U. S. 93 590
People v. Coler, 173 N. Y. 103 73
——— v. Kipley, 171 Ill. 44 77
——— v. Traves, 188 Mich. 345 428
Peoples National Bank v. Mulholland, 224 Mass. 448 154
Pepin v. Bruyere, [1900] 2 Ch. 504 544
Perkins v. Bangs, 206 Mass. 408 85
——— v. Bay State Street Railway, 223 Mass. 235 282
——— v. Davis, 109 Mass. 239 523
Perley v. Cambridge, 220 Mass. 507 56
Perlstein v. American Express Co. 177 Mass. 530 480
Perry v. Bangs, 161 Mass. 35 373
Peters v. Bain, 133 U. S. 670 158
——— v. Erving, 3 Bro. C. C. 54 544
Pevey v. Aylward, 205 Mass. 102 70
Phelps v. New England Railroad, 172 Mass. 98 501
Philadelphia & Reading Railroad v. Derby, 14 How. 468 495
Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326 110
Phillips v. Chase, 201 Mass. 444 596
——— v. ———, 203 Mass. 556 30, 438
——— v. Eldridge, 221 Mass. 103 452
——— v. Meagher, 166 Mass. 152 85
Pierce v. Knight, 182 Mass. 72 514
——— v. Le Monier, 172 Mass. 508 568
——— v. Stevens, 205 Mass. 219 201
Pigeon's Case, 216 Mass. 51 318
Pigeon v. Lane, 80 Conn. 237 490
Pike v. Stephenson, 99 Mass. 188 514
Pinkley v. Chicago & East Illinois Railroad, 246 Ill. 370 60
Pitkin v. Springfield, 112 Mass. 509 373
Plass v. Central New England Railway, 169 App. Div. (N. Y.) 826 61
Plummer v. Dill, 156 Mass. 426 489
Plympton v. Boston Dispensary, 106 Mass. 544 170
Polsey v. Newton, 199 Mass. 450 23
Pomeroy v. Boston & Maine Railroad, 172 Mass. 92 356
Pomponio v. New York, New Haven, & Hartford Railroad, 66 Conn. 528 491
Porter v. County Commissioners, 5 Gray, 365 235
——— v. Porter, 226 Mass. 204 514
Portuguese Fraternity v. Liberty Trust Co. 215 Mass. 27 158
Potter v. Ware, 1 Cush. 519 29
Powers Regulator Co. v. Taylor, 225 Mass. 292 601
Pratt v. Paris Gas Light & Coke Co. 168 U. S. 255 6
Pray v. Clark, 113 Mass. 283 181
——— v. Wasdell, 146 Mass. 324 583
Prescott v. Prescott, 7 Met. 141 289
Prescott v. Prescott, 175 Mass. 64 287
Preston v. Prather, 137 U. S. 604 497
Prince v. Skillin, 71 Maine, 361 73
Provident Institution v. Massachusetts, 6 Wall. 611 113
Puffer Manuf. Co. v. Krum, 210 Mass. 211 457
Pullman Co. v. Adams, 189 U. S. 420 115
Purcell v. Mather, 35 Ala. 570 132
Putnam v. Collamore, 120 Mass. 454 388
——— v. Middleborough, 209 Mass. 456 236, 544
——— v. United States Trust Co. 223 Mass. 199 440

Quigley v. Clough, 173 Mass. 429 340

Raby v. Ridehalgh, 7 DeG., M. & G. 104 224
Rackemann v. Taylor, 204 Mass. 394 236, 544
Rail & River Coal Co. v. Ohio Industrial Commission, 236 U. S. 338 82, 115
Railroad Co. v. Lockwood, 17 Wall. 357 496
Rainger v. Boston Mutual Life Association, 167 Mass. 109 453
Ralph v. Carrick, 11 Ch. D. 873 539
Rand v. Mather, 11 Cush. 1 536
Randall, petitioner, 11 Allen, 473 383
Rawson v. Rawson, 156 Mass. 578 606
Raymond v. Russell, 143 Mass. 295 11
Rea v. Aldermen of Everett, 217 Mass. 427 70
Renado v. Lummus, 205 Mass. 155 77
Renaud v. New York, New Haven, & Hartford Railroad, 206 Mass. 557 501
Renwick v. Macomber, 225 Mass. 380 43
Reynolds v. Denholm, 213 Mass. 576 461
——— v. Missouri, Kansas & Texas Railway, 224 Mass. 379 586
Rice v. Garnhart, 34 Wis. 453 7
——— v. Harbeson, 63 N. Y. 493 544
——— v. Mayo, 107 Mass. 550 465
Richardson v. Bly, 181 Mass. 97 30
Rider v. Taintor, 4 Allen, 356 94
Riley v. Lissner, 160 Mass. 330 509 n.
Rioux v. Cronin, 222 Mass. 131 187, 193
Ripley v. Brown, 218 Mass. 33 46
Rising v. Stannard, 17 Mass. 282 311
Rittenhouse & Embree Co. v. Warren Construction Co. 264 Ill. 619 190
Roberts v. Knights, 7 Allen, 449 588
Robinson v. Fitchburg & Worcester Railroad, 7 Gray, 92 255
Rockwell v. Kelly, 190 Mass. 439 583

Rogers v. American Halibut Co. 216 Mass. 227 441
Rollins v. Marsh, 128 Mass. 116 228
Romana v. Boston Elevated Railway, 218 Mass. 76 340
Rose v. Fall River Five Cents Savings Bank, 165 Mass. 273 420
Ross v. Ross, 129 Mass. 243 605
Russell v. Allen, 2 Allen, 42 395
——— v. Annable, 109 Mass. 72 427
——— v. Jackson, 9 Hare, 387 596
Rutter v. White, 204 Mass. 59 70
Ryder v. Hathaway, 21 Pick. 298 157

Safford v. Weare, 142 Mass. 231 584
St. Johns v. Charles, 105 Mass. 262 130
St. Louis Southwestern Railway v. Arkansas, 235 U. S. 350 113
Sakas v. Lumsden & Van Stone Co. 214 Mass. 429 284
Salem v. Maynes, 123 Mass. 372 373
Salisbury Beach Associates v. Assessors of Salisbury, 225 Mass. 399 522
Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371 81, 247
Sanders v. Partridge, 108 Mass. 556 395
Sanderson's Case, 224 Mass. 558 334, 382
Santom v. Ballard, 133 Mass. 464 217
Sargent v. Seagrave, 2 Curt. 553 7
Saunders v. Boston, 167 Mass. 595 531
Savage v. Collins, 211 Mass. 472 419
——— v. Stevens, 128 Mass. 254 592
Sawyer v. Cook, 188 Mass. 163 444, 602
Scanlon v. Carey, 207 Mass. 285 522
Schlatter v. Young, 197 Mass. 36 131
Schroeppell v. Shaw, 3 Comst. 446 574
Scollard v. American Felt Co. 194 Mass. 127 526
Scott v. Harris, 113 Ill. 447 597
Sears v. Choate, 146 Mass. 395 46, 388
——— v. Nahant, 205 Mass. 558 234
Sedgwick v. Minot, 6 Allen, 171 540
Sellinger v. Kentucky, 213 U. S. 200 526
Sewall v. Wilmer, 132 Mass. 131 471
Shapter's Estate, In re, 35 Col. 578 597
Shaw v. Eckley, 169 Mass. 119 514
Shawmut Commercial Paper Co. v. Brigham, 209 Mass. 199 570
Shea v. American Hide & Leather Co. 221 Mass. 282 354, 415
Shepard v. Jacobs, 204 Mass. 110 318
Sherman v. Warren, 211 Mass. 288 43
Sherwin v. Fletcher, 168 Mass. 413 180
Shiells v. Blackburne, 1 H. Bl. 158 505
Sibley v. Maxwell, 203 Mass. 94 316
Silloway v. Brown, 12 Allen, 30 96
Silsbee v. Silsbee, 211 Mass. 105 515
Simon v. Southern Railway, 236 U. S. 115 589
Skally v. Shute, 132 Mass. 367 393
Skipper v. Stokes, 42 Ala. 255 132
Slater v. Hurlbut, 146 Mass. 308 46
Slaymaker v. Farmers' National Bank of Lancaster, 103 Penn. St. 616 228
Slotofski v. Boston Elevated Railway, 215 Mass. 318 518, 565
Smedley v. Johnson, 196 Mass. 316 567
Smith v. Aldrich, 180 Mass. 367 350
——— v. Butler, 176 Mass. 38 588
——— v. Duncan, 181 Mass. 435 354
——— v. First National Bank in Westfield, 99 Mass. 605 498
——— v. Haynes, 202 Mass. 531 175
——— v. Kimball, 193 Mass. 582 343
——— v. Lincoln, 198 Mass. 388 522
——— v. Paul Boyton Co. 176 Mass. 217 204
——— v. Postal Telegraph Cable Co. 174 Mass. 576 500
——— v. Sanborn, 6 Gray, 134 157
——— v. Smith, 186 Mass. 138 514
Smolik v. Philadelphia & Reading Coal & Iron Co. 222 Fed. Rep. 148 590
Society for Savings v. Coite, 6 Wall. 594 109
Sohier v. Eldredge, 103 Mass. 345 171
Soper v. Brown, 136 N. Y. 244 515
Southcote's Case, 4 Co. Rep. 83 *b* 505
Southcote v. Stanley, 1 H. & N. 247 510
Southern Pacific Co. v. Kentucky, 222 U. S. 63 527
Southern Railway v. Greene, 216 U. S. 400 113
Spear v. Hardon, 215 Mass. 89 458
Spence v. Union Marine Ins. Co. Ltd. L. R. 3 C. P. 427 158
Spooner v. Old Colony Street Railway, 190 Mass. 132 501
Sporza v. German Savings Bank, 192 N. Y. 8 76
Sprague v. Kimball, 213 Mass. 380 246
Springfield v. Springfield Street Railway, 182 Mass. 41 578
Springfield Safe Deposit & Trust Co. v. Dwelly, 219 Mass. 65 22
S. S. White Dental Manuf. Co. v. Commonwealth, 212 Mass. 35 107, 122
——— v. Massachusetts, 231 U. S. 68 107, 122
Staigg v. Atkinson, 144 Mass. 564 55
Standard Scale & Foundry Co. v. McDonald, 127 Fed. Rep. 709 9
State v. Douglas, 26 Wis. 428 73
——— v. Hawkins, 44 Ohio St. 98 72
——— v. Lewis, 51 Conn. 113 72
——— v. Markham, 160 Wis. 431 77
——— v. ———, 162 Wis. 55 77
——— v. Moores, 56 Neb. 1 75
——— v. Pierce, 163 Wis. 615 82

State v. Smith, 14 Wis. 497 77
——— v. Thompson, 91 Minn. 279 75
——— v. Van Beek, 87 Iowa, 569 77
State Railroad Tax Cases, 92 U. S. 575 110
Steamboat New World v. King, 16 How. 469 496
Stearns v. Herrick, 132 Mass. 114 157
——— v. Old Colony & Fall River Railroad, 1 Allen, 493 277
Stevens v. Boston Elevated Railway, 184 Mass. 476 479
——— v. Nichols, 155 Mass. 472 492
Stewart v. Cushing, 204 Mass. 154 509 n.
——— v. Finkelstone, 206 Mass. 28 246
Stillings v. Turner, 153 Mass. 534 568
Stockbridge v. Mixer, 215 Mass. 415 77, 190
Stoliker v. Boston, 204 Mass. 522 360
Stone v. Heath, 179 Mass. 385 373
——— v. Littlefield, 151 Mass. 485 169
——— v. Livingston, 222 Mass. 192 210
——— v. Smith, 159 Mass. 413 81
Storer v. Gowan, 18 Maine, 174 502
Storm v. Manchaug Co. 13 Allen, 10 248
Stuart v. Cambridge, 125 Mass. 102 554
Sullivan v. Ashfield, 227 Mass. 24 236
——— v. Hurley, 147 Mass. 387 379
Sundine's Case, 218 Mass. 1 334, 382
Swan v. Justices of the Superior Court, 222 Mass. 542 15
Swasey v. Jaques, 144 Mass. 135 539

Taft v. Adams, 3 Gray, 126 73
——— v. Stow, 167 Mass. 363 535
Tailby v. Official Receiver, 13 App. Cas. 523 131
Talbot v. Whipple, 14 Allen, 177 392
Tappan v. Deblois, 45 Maine, 122 199
Tarbell v. Jewett, 129 Mass. 457 229
Tax Commissioner v. Putnam, 227 Mass. 522 78
Taylor v. Allhusen, [1905] 1 Ch. 529 472
——— v. Beckham, 178 U. S. 548 80
——— v. Carr, 125 Tenn. 235 73
——— v. Finnigan, 189 Mass. 568 393
——— v. Lovering, 171 Mass. 303 228
——— v. Schofield, 191 Mass. 1 466
Teele v. Hathaway, 129 Mass. 164 513
Tehan v. Justices of Municipal Court of Boston, 191 Mass. 92 82, 90
Temple v. Phelps, 193 Mass. 297 596
Tenney v. Poor, 14 Gray, 500 437
——— v. Tuttle, 1 Allen, 185 255
Tewksbury v. County Commissioners, 117 Mass. 563 17
Thayer v. Daniels, 113 Mass. 129 131
——— v. Thayer, 101 Mass. 111 378
Thomas v. Bennett, 56 Barb. 197 228
——— v. Boston Elevated Railway, 193 Mass. 438 282
Thomas v. Lane, 221 Mass. 447 509
Thompson v. Dolliver, 132 Mass. 103 388
——— v. Ish, 99 Mo. 160 597
——— v. Thornton, 197 Mass. 273 289, 541
——— v. United Laboratories Co. 221 Mass. 276 60
Thompson Foundry & Machine Co. v. Glass, 136 Ala. 648 458
Thomson v. Pentecost, 210 Mass. 223 298
Thornton v. Marginal Freight Railway, 123 Mass. 32 486
Tobey v. Kip, 214 Mass. 477 526
Tombs v. Alexander, 101 Mass. 255 147
Tompkins v. Wheeler, 16 Pet. 106 601
Tornroos v. R. H. White Co. 220 Mass. 336 318
Torphy v. Fall River, 188 Mass. 310 359
Tourtillotte v. Tourtillotte, 205 Mass. 547 535
Tracy v. Maloney, 105 Mass. 90 91
Travers v. Boston Elevated Railway, 217 Mass. 188 476
Trowbridge v. Wetherbee, 11 Allen, 361 536
Truesdell v. Thompson, 12 Met. 565 94
Tucker v. Fisk, 154 Mass. 574 69
Tuell v. Hurley, 206 Mass. 65 470
Turner v. Nye, 154 Mass. 579 248
Turvey v. Brinton's, Ltd. [1904] 1 K. B. 328 63
Tyler v. Hammond, 11 Pick. 193 55

Ungrich, In re, 201 N. Y. 415 224
Union National Bank of Oshkosh v. German Ins. Co. of Freeport, 71 Fed. Rep. 473 304
Union Naval Stores Co. v. United States, 240 U. S. 284 157
Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 526
Uniontown Bank v. Mackey, 140 U. S. 220 574
Union Trust Co. v. Bulkeley, 80 C. C. A. 328 131
United States v. Bennett, 232 U. S. 299 526
——— v. Certain Lands, 112 Fed. Rep. 622 246
——— v. Cruikshank, 92 U. S. 542 81
——— v. E. C. Knight Co. 156 U. S. 1 112
——— v. Reese, 92 U. S. 214 81
——— v. Waddell, 112 U. S. 76 76
United States Express Co. v. Minnesota, 223 U. S. 335 115

Veazey's Case, 10 Buch. 466 597
Vennen v. New Dells Lumber Co. 161 Wis. 370 60

Virtue v. Creamery Package Manuf. Co. 102 C. C. A. 413 11
Von Ette's Case, 223 Mass. 56 332, 382

Wade v. Smith, 213 Mass. 34 264
Wagner v. Jayne Chemical Co. 147 Penn. St. 475 60
Wakefield v. American Surety Co. 209 Mass. 173 453
Walden v. Walden, 213 Mass. 418 24
Wales v. Belcher, 3 Pick. 508 71
Walker v. Sauvinet, 92 U. S. 90 80
——— v. Treasurer & Receiver General, 221 Mass. 600 470
Wall v. Kelly, 209 Mass. 370 602
——— v. Provident Institution for Savings, 6 Allen, 320 559
Wallace v. Lowell Institution for Savings, 7 Gray, 134 559
Walsh v. Turner Centre Dairying Association, 223 Mass. 386 284
Ward v. Aldermen of Newton, 181 Mass. 432 17
——— v. Cobb, 148 Mass. 518 465
——— v. Fletcher, 125 Mass. 224 343
Warner v. Morrison, 3 Allen, 566 574
Warren v. Mayor & Aldermen of Charlestown, 2 Gray, 84 81
Washburn v. Phillips, 2 Met. 296 82
Wasserman v. McDonnell, 190 Mass. 326 131
Watson v. Watson, 150 Mass. 84 24
Watts v. Howard, 7 Met. 487 169
Waucantuck Mills v. Magee Carpet Co. 225 Mass. 31 385
Way v. Reed, 6 Allen, 364 392
Webber v. Benbow, 211 Mass. 366 377
Webster v. Commonwealth, 5 Cush. 386 217
Welch v. Blanchard, 208 Mass. 523 292, 413
——— v. Boston, 221 Mass. 155 236
——— v. Episcopal Theological School, 189 Mass. 108 293
——— v. Fox, 205 Mass. 113 82, 91
——— v. Hill, 218 Mass. 327 172
——— v. Swasey, 193 Mass. 364 373
Weldon v. Prescott, 187 Mass. 415 56
West v. Poor, 196 Mass. 183 489
Western Union Telegraph Co. v. Kansas, 216 U. S. 1 111
Westinghouse Electric & Manuf. Co. v. Wagner Electric & Manuf. Co. 225 U. S. 604 157
Weston v. Foster, 7 Met. 297 345
Wetherbee v. Potter, 99 Mass. 354 536
Whalen v. Rosnosky, 195 Mass. 545 284
Whall v. Converse, 146 Mass. 345 413
Wharton v. United States, 83 C. C. A. 58 246
Whipple v. Fairchild, 139 Mass. 262 471
——— v. Newton, 17 Pick. 168 593
——— v. Rich, 180 Mass. 477 204
Whitcomb v. Whitcomb, 217 Mass. 558 518
White v. Franklin Bank, 22 Pick. 181 559
——— v. George A. Fuller Co. 226 Mass. 1 188
———. v. Underwood, 215 Mass. 299 292
White Co. v. Commonwealth, 218 Mass. 558 114
Whitehead v. Kitson, 119 Mass. 484 11
White Sewing Machine Co. v. Phenix Nerve Beverage Co. 188 Mass. 407 204
Whitfield v. Aetna Life Ins. Co. 205 U. S. 489 187
Whitman v. Huefner, 221 Mass. 265 22, 514
——— v. Whitney, 225 Mass. 213 22
Whitney v. Lee, 8 Met. 91 490
——— v. Union Railway, 11 Gray, 359 188
Wiggin v. Swett, 6 Met. 194 45
Wilbour v. Turner, 5 Pick. 526 94
Wilcox v. Mills, 4 Mass. 217 431
Wiley v. Connelly, 179 Mass. 360 583
Wilks v. Burns, 60 Md. 64 471
Willard v. Rice, 11 Met. 493 157
——— v. Wright, 203 Mass. 406 147, 343
Willey v. St. Charles Hotel Co. 52 La. Ann. 1581 544
William Gilligan Co. v. Casey, 205 Mass. 26 131
Williams v. American Bank, 4 Met. 317 472
——— v. Roxbury, 12 Gray, 21 522
——— v. Spencer, 150 Mass. 346 29
——— v. United States, 168 U. S. 382 273
Williamson v. Lane, 52 Texas, 335 72
Wilmarth v. Richmond, 11 Cush. 463 431
Wilson, Ex parte, 114 U. S. 417 77
——— v. Boylston National Bank, 170 Mass. 9 230
——— v. Brett, 11 M. & W. 113 494
——— v. Massachusetts Institute of Technology, 188 Mass. 565 246
——— v. Mitchell-Woodbury Co. 214 Mass. 514 440
——— v. Russell, 136 Mass. 211 131
Winston v. Pittsfield, 221 Mass. 356 297
Winters v. Winters, 102 Iowa, 53 597
Winthrop v. Attorney General, 128 Mass. 258 410
Wood v. Blanchard, 212 Mass. 53 452
Woodall v. Boston Elevated Railway, 192 Mass. 308 333
Woodbury v. Woodbury, 141 Mass. 329 30
Woods v. Matthews, 224 Mass. 577 343, 466

Worcester v. Cook, 220 Mass. 539 297
——— v. Lakeside Manuf. Co. 174 Mass. 299 594
——— v. Worcester Consolidated Street Railway, 182 Mass. 49 578
Worcester & Nashua Railroad v. Railroad Commissioners, 118 Mass. 561 17
Worcester Color Co. v. Henry Wood's Sons Co. 209 Mass. 105 75, 452
Wright v. Lowell, 166 Mass. 298 235
——— v. Nutt, 3 Bro. C. C. 326 544
W. S. Quinby Co. v. Estey, 221 Mass. 56 318
Wurts v. Hoagland, 114 U. S. 606 248
Wynn v. Provident Life & Trust Co. 206 N. Y. 701 454

Yarbrough, Ex parte, 110 U. S. 651 81
Yost v. Lake Erie Transportation Co. 50 C. C. A. 511 527
——— v. ———, 112 Fed. Rep. 746 527
Young v. Blaisdell, 138 Mass. 344 72
——— v. Duncan, 218 Mass. 346 78
——— v. Lion Hardware Co. 55 Ohio St. 423 190
——— v. Snow, 167 Mass. 287 45

Zachary v. Gregory, 32 Texas, 452 229
Zwicker v. Gardner, 213 Mass. 95 536

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

ABRAHAM ARONSON & another *vs.* GEORGE ORLOV & others.

Suffolk. December 4, 1916. — July 2, 1917.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Malicious Interference. Equity Jurisdiction, To enjoin unlawful interference. *Master and Servant. Jurisdiction. Patent. Equity Pleading and Practice,* Master, Appeal, Amendment. *Damages,* In equity, Interest.

A bill in equity may be maintained by a firm who were manufacturers and sellers at retail in various parts of the country of close fitting petticoats constructed in accordance with an invention of one of them providing a certain amount of elasticity within the seams, which has not yet been patented but which is a trade secret, against two former employees and a third person to restrain the defendants from interfering with the business of the plaintiffs by making use of the trade secrets and for damages for past interference, where it appears that one of the defendants while in the plaintiffs' employ learned the secret, that he communicated it to the other defendant while he was employed by the plaintiffs and that they then left the plaintiffs' employ and entered into a business arrangement with the third defendant, who knew all the circumstances, for the manufacture and sale of petticoats made in accordance with the plaintiffs' idea in competition with the plaintiffs, that this plan was carried out and the defendants wrote letters to customers of the plaintiffs threatening them with prosecution for infringement of alleged rights of the third defendant under the patent laws, whereby such customers were caused to break valuable contracts with the plaintiffs and other prospective purchasers were deterred from entering into contracts with the plaintiffs, all of which was done with the deliberate purpose of injuring the plaintiffs' sale of garments manufactured according to his invention.

No rights exist under a patent until it has been granted.

Previous to the issuance of a patent, no case can arise under the patent laws respecting the relative rights of the parties to or under a patent, such that the exclusive jurisdiction of the case would be in the United States courts.

Although in the suit above described the plaintiffs in their bill alleged that they held by assignment the rights of the one of their own number who had filed an application for a patent for his device which still was pending, and that one of the two defendants who formerly were employees had filed such an application and had assigned his rights to the third defendant, and that such application also still was pending, the suit was not one arising "under the patent laws of the United States," and the State court had jurisdiction of it, both because it did not appear that any patent had been granted and because the gravamen of the suit was the malicious and wrongful interference with the plaintiffs' business and not an infringement of rights under a patent or an application therefor.

It is proper to overrule exceptions to a master's report which relate only to findings of fact and refusals to find facts, where the evidence before the master is not reported.

Where a master is not required, under the rule committing a suit to him, to report the evidence, it would be improper for him to do so without an order of the court.

In the suit above described, after the filing of the master's report, the defendants moved to amend their answers by alleging that their application for a patent was pending until three months after the bill in equity was filed, when it was divided and a divisional application was filed covering a part of the original claim, which was granted to one of the defendants and a fourth party three months later. The motion was denied. From earlier pleadings of the defendants and answers to interrogatories propounded to them it appeared that they purposed to deny or conceal the facts about any application on their behalf for a patent. *Held*, that the question of the allowance of the motion was within the discretion of the judge and that it could not be said that he had abused that discretion, especially since the issuance of the patent would not have been decisive of the suit.

By going to trial on the merits in a suit in equity the defendant waives a right to defend on the ground that the plaintiff has a complete remedy at law.

In the suit above described it appeared that, owing to a change in fashion, the elastic petticoat, and therefore the plaintiffs' invented idea which the defendants had appropriated, at the time of the decision had little present value, so that no injunctive relief needed to be granted; but, it appearing upon the master's finding that, from the interference of the defendants with contracts between the plaintiffs and their customers, the plaintiffs had been damaged to the extent of $5,692.67, it was *held*, that the suit should be retained for the awarding of such damages to the plaintiffs; and also that the plaintiffs were entitled to interest on that sum from the date of the master's report.

BILL IN EQUITY, filed in the Superior Court on July 21, 1914, and described in the opinion.

In the Superior Court the suit was referred to a master. The material facts found by the master are described in the opinion. The defendants filed exceptions to and a motion to recommit the

report, as well as several motions for leave to amend their answers, all of which are described in the opinion. After a hearing by *Fox*, J., an interlocutory decree was entered by his order overruling the exceptions and denying the motions. The defendants moved that such interlocutory decree be vacated. After a hearing, that motion also was denied by the same judge and, upon a motion by the plaintiffs for a final decree, he reserved the case for determination by this court upon all the pleadings and the master's report.

C. H. Dow, for the plaintiffs.

G. R. Nutter, for the defendants.

RUGG, C. J. The case, as stated in the bill, is that the plaintiffs are and for a long time have been manufacturers of petticoats in Boston and sellers of the same to large retail dealers in various parts of the country; that in November, 1912, one of them, named H. Aronson, conceived an invention to remedy some of the difficulties encountered in the use of close fitting petticoats by providing a certain amount of elasticity in connection with the seams; that later he filed an application for a patent on this invention; that the plaintiffs subsequently manufactured petticoats in accordance with the idea of H. Aronson, which were called "Flexo Seam;" that in December, 1912, two of the defendants, Fatherson and Wachtel, were in the employ of the plaintiffs and by reason and in the course of that employment the plaintiffs communicated to them the knowledge of this improvement; that subsequently Fatherson and Wachtel left the employ of the plaintiffs and entered into an arrangement with Orlov, the other defendant, who was not then a manufacturer of petticoats and who knew all the circumstances, whereby they were to develop the Aronson idea and then Orlov was to manufacture and sell petticoats in competition with the plaintiffs among their customers, and that this plan had been carried out, and that letters had been written by the defendants to the customers of the plaintiffs threatening them with prosecution for infringement of alleged rights of the defendant Orlov under the patent laws, whereby certain customers were caused to break contracts with the plaintiffs for the purchase of petticoats of their manufacture, and other prospective purchasers were deterred from entering into contracts for such purchases, all to the great damage of the

plaintiffs. The defendants answered, in substance admitting none of these allegations and denying them all. The case was sent to a master. His findings support in all essential particulars the averments of the bill, except that it is not clear whether Wachtel learned of the proposed improvement conceived by Aronson while in the plaintiffs' employ, or was told of it by Fatherson, who learned of it directly from Aronson. But he finds in addition that the attorney of Orlov and the defendant Fatherson filed an application for a patent in January, 1914, which has not been disallowed, and that in the April or May following Aronson filed an application for a patent which has been disallowed. The defendants, in the name of the defendant Orlov, in April and May, 1914, wrote and mailed two thousand or three thousand letters to the trade throughout the United States, including those known to them to be customers of the plaintiffs. These letters stated in substance that petticoats of their manufacture, called "Wundre Seam," were patentable and that patents had been applied for and that "I am the assignee and owner of these patent rights," that the writer was informed that attempts were "being made to manufacture and sell similar articles," and notified the recipient that "the purchase by you or offering of such articles for sale will be an infringement on my rights and make you liable to me for damages." This letter was sent, according to the master's finding, not only to the trade but to the plaintiffs' customers, "with the deliberate purpose of injuring the plaintiffs' sales of the Flexo Seam garments," the trade name adopted by the plaintiffs for the garments manufactured by them in accordance with the idea conceived by H. Aronson.

Apart from the questions arising because of the applications for patents, it is plain that the plaintiffs make out a case for equitable relief on the facts found by the master. The idea of the improvement in the manufacture of garments was Aronson's. It was not a mere nebulous phantom of the fancy, but a definite conception of a material device so simple that its mere statement would convey as clear a notion as would a model of a complicated mechanism. This idea was used rightfully by the plaintiffs. Fatherson was the first of the defendants to know of that idea and he learned of it solely by reason of and in the course of his employment by the plaintiffs. The doctrine is well settled that

an employee cannot lawfully use for the advantage of a rival and to the harm of his employer confidential information which he has gained in the course of his employment. This rests upon the implied contract, growing out of the nature of the relation, that the employee will not after the termination of his service use information gained during the period of his employment to the detriment of his former employer. This doctrine has been frequently applied in this Commonwealth and it prevails generally. *Peabody* v. *Norfolk*, 98 Mass. 452. *American Stay Co.* v. *Delaney*, 211 Mass. 229. *Essex Trust Co.* v. *Enwright*, 214 Mass. 507. See *American Circular Loom Co.* v. *Wilson*, 198 Mass. 182, 207; *Agawam Co.* v. *Jordan*, 7 Wall. 583, 602.

It is also true, as decided by these and other cases, that equity will enjoin interference with the right of a manufacturer to his own trade secrets and will prevent continuance of violation of duty by a former employee in divulging them, and will give relief in damages for injury already inflicted. There is a plain distinction between instances where employees leave one employer and use their own faculties, skill and experience in the establishment of an independent business or in the service of another, and instances where they use confidential information secured solely through their employment to the harm of their previous employer.

The plaintiffs have clear ground for relief against their former employees, Fatherson and Wachtel. The former, at least, has appropriated the Aronson idea for improvement in dress design acquired solely through his employment. The latter participated in, if he did not frame, the scheme whereby Orlov was to embark in the business of manufacturing petticoats in competition with the plaintiffs by the use of the information which he and Fatherson had acquired wholly through their employment by the plaintiffs. Orlov in this respect stands no better than the other two defendants. The Aronson idea was communicated to him by one or both of his co-defendants. At the first meeting of the three, the previous employment and experience of Fatherson with the plaintiffs formed the subject of the conference. Orlov and Wachtel were well acquainted. The inference is irresistible that one of his dominating motives in forming the arrangement with the other two was the knowledge that there would be at his disposal the Aronson idea of garment design. Under these circum-

stances he is on the same footing and subject to the same liabilities as Wachtel and Fatherson. *Morison* v. *Moat*, 9 Hare, 241, 263.

It is contended that the subject matter of this suit is within the exclusive jurisdiction of the federal courts and that, therefore, the State court is without jurisdiction. That contention rests upon the theory that the case arises under the patent laws of the United States. By the Constitution and laws of the United States exclusive jurisdiction "of all cases arising under the patent right, or copyright laws of the United States" is vested in the courts of the United States. U. S. Const. art. 1, § 8. The Judicial Code, approved March 3, 1911, c. 231, § 256. 36 U. S. Sts. at Large, 1161. The question presented is whether the present suit is "a cause arising under the patent right, or copyright laws." The meaning of these words has been settled by numerous decisions. It was said in *Pratt* v. *Paris Gas Light & Coke Co.* 168 U. S. 255, 259: "There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading — be it a bill, complaint or declaration — sets up a right under the patent laws as ground for a recovery. Of such the State courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the State tribunals." This statement has been cited with approval frequently. *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.* 185 U. S. 282, 286. *Minnesota* v. *Northern Securities Co.* 194 U. S. 48, 64. Suits, although involving the patent laws of the United States, are not cases under the patent laws "where they do not turn on a controversy between the parties in regard to the operation of" such laws on the facts. *Bankers Mutual Casualty Co.* v. *Minneapolis, St. Paul & Sault Sainte Marie Railway*, 192 U. S. 371, 384. Said Mr. Justice Lurton in *Henry* v. *A. B. Dick Co.* 224 U. S. 1, at page 16: "The test of jurisdiction is this: Does the complainant 'set up some right, title or interest under the patent laws of the United States, or make it appear that some right or privilege will be defeated by one construction, or sustained by another, of those laws?'" It was said by Mr. Justice Gray in *David* v. *Park*, 103 Mass. 501, at page 503: "Questions of the existence, validity or construction of letters patent for inventions when arising collat-

erally in a suit in a State court, must be there tried and determined. *Nash* v. *Lull*, 102 Mass. 60." See also Blatchford, J., in *Merserole* v. *Libby*, 6 Blatchf. 356. Questions respecting patents, when they arise as an incident to litigation pending in State courts, and when not brought directly for the infringement of a patent or to declare a patent void, are within the cognizance of the State court. They have been considered often by this court and by other courts. *Binney* v. *Annan*, 107 Mass. 94. *Carleton* v. *Bird*, 94 Maine, 182. *Dunbar* v. *Marder*, 13 N. H. 311. *Rice* v. *Garnhart*, 34 Wis. 453, 462. *Green* v. *Wilson*, 6 C. E. Green, 211. *Myers* v. *Turner*, 17 Ill. 179. See *Allen* v. *Riley*, 203 U. S. 347.

There is no averment in the plaintiffs' bill that either they or the defendants are the owners of a patent or that any patent touching the flexible skirt has been issued to anybody. The utmost extent of any allegation is that an application for a patent has been filed by H. Aronson, whose rights have been assigned to the plaintiffs, and "that said application is still pending in said Patent Office." The bill also alleges that an application for a patent for the same invention has been filed by Fatherson or Wachtel and assigned to Orlov, and that said application also is still pending. No one of the answers of the defendants sets up a claim to any patent right or avers that a patent respecting the subject has been issued to anyone. On the contrary, they filed several answers and each specifically denied the averments of the bill respecting any application for a patent by him.

No rights exist under a patent until a patent has been granted. It has been decided repeatedly that there can be no recovery in the ordinary case for use of a patented article made before the patent was granted. The inventor has no exclusive right before a patent has been issued to him. The patent is not retroactive to a date prior to the grant. The establishment of the monopoly does not antedate the grant of the patent. That grant is fixed as of its date. *Kirk* v. *United States*, 163 U. S. 49, 55. *Gayler* v. *Wilder*, 10 How. 477, 493. *Marsh* v. *Nichols, Shepard & Co.* 128 U. S. 605, 612. *Brown* v. *Duchesne*, 19 How. 183, 195. *Sargent* v. *Seagrave*, 2 Curt. 553, 555. The grant of a patent cannot be antedated. It takes effect as of the date when actually issued, and not before. *Marsh* v. *Nichols, Shepard & Co.* 128 U. S. 605, 616. It is, it seems to us, an unavoidable result from this prin-

ciple that prior to the issuance of a patent no case can arise under the patent laws respecting the relative rights of parties to or under a patent.

The gravamen of the plaintiffs' complaint is that certain information gained confidentially by two of the defendants while in their employ has been wrongfully communicated to the third defendant with full knowledge on his part of all the circumstances, so that his knowledge is tainted with the same infirmities that affect his co-defendants, and that the three have wrongfully used that knowledge to the plaintiff's harm.

The case at bar in our opinion does not arise "under the patent laws" of the United States. The plaintiffs do not rest upon any right secured by the patent laws, and they do not assail any monopoly conferred upon the defendants by such laws. Every reference to the application for a patent and to the patent laws might be stricken from the bill, and every fact respecting that subject might be eliminated from the master's report, without affecting or impairing the fundamental rights upon which the plaintiffs' case rests. On the other hand, giving full effect to every allegation in the bill touching patents and to every fact found by the master relative to that subject, involves no right arising under the patent laws. Even when a patent has been granted, business transactions entered upon and executed before the patent was granted are not ordinarily affected. Concededly, no patent was granted to anybody for anything respecting this subject until long after this suit was instituted. The question which the plaintiffs are seeking to have settled in this cause is not their right to a patent but their right to be protected from unlawful trade interference. The circumstance that priority of conception of an idea, which may or may not involve a patentable invention, was incidentally involved on one aspect of that unlawful interference, renders the subject of the patent laws of the United States, if a patent ever should be granted, collateral and incidental to a cause over which the State courts have jurisdiction.

This suit is not brought to determine the priority of an invention, and hence the right to a patent. It is brought to prevent the unlawful use of information, which may relate in part to an invention about the patentability of which there is contention, which has been obtained under such confidential circumstances that it

ought not to be used to their harm. See *Agawam Co.* v. *Jordan*, 7 Wall. 583, 602. Therefore, the statement of the Circuit Court judge in *Standard Scale & Foundry Co.* v. *McDonald*, 127 Fed. Rep. 709, 710, that "it never was the mind of Congress that the inventor, without complying with the statutory scheme of submitting his claim to the Patent Office for its action thereon could go into a United States Court in the first instance, to have determined the question of his right to a patent," has no application to the facts here disclosed.

The plaintiffs' ground for relief seems far more remote from the patent laws of the United States than actions on notes given for patents where the voidness of the patent, *Dickinson* v. *Hall*, 14 Pick. 217, its invalidity because of fraudulent procurement, *Bliss* v. *Negus*, 8 Mass. 46, its want of utility, *Bierce* v. *Stocking*, 11 Gray, 174, and its utter worthlessness, *Lester* v. *Palmer*, 4 Allen, 145, have been considered as defences and directly adjudicated by this court. All of these cases were cited with approval in *Pratt* v. *Paris Gas Light & Coke Co.* 168 U. S. 255, 260, 261, together with an amplitude of other authorities showing the wide scope of jurisdiction rightly taken by State courts of questions involving incidentally the validity of patents when the action was not brought directly and chiefly for infringement or to test the validity of a patent.

There would be, upon the strength of these authorities, ground for the contention that a suit in equity by the inventor of a useful mechanism, while his application for a patent was pending under the laws of the United States and not yet granted, might in appropriate instances seek and obtain an injunction in the State courts against one who was pirating the invention under circumstances which warranted the inference of a threat to use it after a patent should be granted. *Brill* v. *St. Louis Car Co.* 80 Fed. Rep. 909. But the plaintiffs' case does not rest upon that ground.

The exceptions to the master's report were overruled rightly. Many of them relate to findings of fact and refusals to make findings of fact. The evidence is not reported and hence no error is shown in this respect. The master was not required under the rule to report the evidence and it would have been irregular for him to do so without an order to that effect. *Mathews* v. *Colburn*, 215 Mass. 571.

The allowance of the amendments to their answers requested by the defendants was in the discretion of the judge. There is nothing to indicate there was an abuse of discretion in denying the motion to amend the answer by setting out that the defendants' application for a patent was pending until October 23, 1914, when it was divided and a divisional application filed covering a part of the original claim, which was granted to the defendant Fatherson and one Hogan on January 19, 1915. This motion was presented after the master's report was filed. For the reasons already pointed out the fact here averred, if true, would not divest the court of jurisdiction. It does not appear that this would affect the rights of the plaintiffs or defendants as to the matters here in issue. But whether they would or not, would not be decisive. The earlier pleadings of defendants and their answers to interrogatories had manifested a purpose to deny or conceal the facts about their application, or that of either of them alone or with another, for a patent. It was discretionary with the court whether to allow this amendment.

The amendment to the answer setting up complete remedy at law came after the hearing by the master and was disallowed rightly. If there ever was anything in this point, it had been waived by going to trial before the master. *Bauer* v. *International Waste Co.* 201 Mass. 197, 201.

The question of exclusive jurisdiction in the Federal courts has been considered, *National Fertilizer Co.* v. *Fall River Five Cents Savings Bank*, 196 Mass. 458, 462, *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175, and the disallowance of the motion to amend in this regard has not harmed the defendants. It was denied rightly as matter of law.

Since it seems to have been conceded that the change in fashion has rendered the elastic petticoat, and hence the Aronson idea appropriated by the defendants, of little present value, no injunctive relief need be granted.

But the plaintiffs are entitled to the damages found by the master in the sum of $5,692.67. Jurisdiction in equity will be retained for this purpose. *Newburyport Institution for Savings* v. *Puffer*, 201 Mass. 41, 47. It is expressly found that the threatening letters were sent out to the trade throughout the country by the defendants "with the deliberate purpose of injuring the plain-

tiffs' sales." In essence they were founded upon a definite conception wrongly obtained from the plaintiffs. They were sent to numerous persons who already had contracts with the plaintiffs. They were couched in such phrases that they naturally would disturb and alarm, if not intimidate, these customers of the plaintiffs into breaking their contracts. While these letters stated truly that patents had been applied for, they also contained the implication that the defendant Orlov had present rights in the nature of patent rights. They naturally would produce the impression that he had exclusive rights under the patent laws. By the assertion of the present right to collect damages, he was going beyond any possible claim that he could have if he were a genuine inventor and certain in due course to secure the patent. The letters were in this respect at least untruthful in their implications. There is ground for the contention that they went quite beyond that point. The letters are calculated to accomplish the harm which the master finds they were intended to cause. The owner of a patent already issued may notify infringers and warn of his intent to protect his rights, if he acts in good faith. *Virtue* v. *Creamery Package Manuf. Co.* 102 C. C. A. 413, 418. But even an owner of a patent cannot attack a rival in business in bad faith and by threatening letters seek to intimidate his customers and coerce that rival to yield to unjustifiable demands. *A. B. Farquhar Co. Ltd.* v. *National Harrow Co.* 42 C. C. A. 600. *Adriance, Platt & Co.* v. *National Harrow Co.* 58 C. C. A. 163. One design of the defendants' conduct was to induce customers of the plaintiffs to break their contracts with them, a design which on the findings of the master was fulfilled in numerous instances. This branch of the case is covered by *American Stay Co.* v. *Delaney*, 211 Mass. 229, *Essex Trust Co.* v. *Enwright*, 214 Mass. 507, *Beekman* v. *Marsters*, 195 Mass. 205, and *Davis* v. *New England Railway Publishing Co.* 203 Mass. 470, 479. The cases of *Boston Diatite Co.* v. *Florence Manuf. Co.* 114 Mass. 69, and *Whitehead* v. *Kitson*, 119 Mass. 484, are distinguishable. They both were decided on demurrer and not upon questions raised after a voluntary hearing before a master, they did not relate to a betrayal of trade secrets, and they arose before this court had complete equity jurisdiction. The circumstances of the case at bar distinguish it from *Raymond* v. *Russell*, 143 Mass. 295, and *Finnish Temperance Society Sovittaja*

v. *Raivaaja Publishing Co.* 219 Mass. 28, because in those cases no breach of trust or of contract was involved. The plaintiffs are entitled also to interest upon the amount found by the master from the date of his report. R. L. c. 177, § 8. *Hawkes* v. *Lackey*, 207 Mass. 424, 434.

There is nothing else in the exceptions or arguments of the defendants which needs to be noticed in detail. The interlocutory decrees are affirmed. Final decree is to be entered for the plaintiffs in accordance with this opinion, for the amount of damages found by the master, and interest, with costs. The details may be fixed in the Superior Court.

So ordered.

COMMISSIONER OF PUBLIC WORKS OF THE CITY OF BOSTON *vs.* JUSTICE OF THE MUNICIPAL COURT OF THE DORCHESTER DISTRICT OF THE CITY OF BOSTON & STORRS L. DURKEE.

SAME *vs.* JUSTICE OF THE MUNICIPAL COURT OF THE DORCHESTER DISTRICT OF THE CITY OF BOSTON & FRANK A. McINNESS.

SAME *vs.* JUSTICE OF THE MUNICIPAL COURT OF THE DORCHESTER DISTRICT OF THE CITY OF BOSTON & BLISS W. ROBINSON.

Suffolk. March 13, 1917. — July 3, 1917.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Civil Service. Certiorari. Words, "Final and conclusive."

The provision of St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, that, on a petition of a person holding an office classified under the civil service rules of the Commonwealth to the police, district or municipal court within the judicial district where such person resides for review of the action of an officer or board in removing the petitioner, "The decision of the justice of said police, district or municipal court shall be final and conclusive upon the parties," means that the justice's findings of fact shall be final and binding on the parties, but it does not leave the parties without remedy if there are essential errors of law apparent on the record of the proceedings depriving such a party of substantial rights, and a person so aggrieved may maintain a petition for a writ of certiorari to quash such erroneous proceedings.

Petitions for writs of certiorari were brought by the commissioner of public works of the city of Boston against a justice of the Municipal Court of the Dorchester District of that city to quash orders made by that judge upon reviews under

St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, reversing orders made by the petitioner abolishing the office of supervisor of permits of the public works department and the offices of division engineer and superintendent of main drainage of the sewer and water service of the public works department, on the ground that the orders abolishing the offices were made in bad faith as an attempted evasion of the requirements of the civil service statutes. The returns of the respondents to the petitions set forth sufficient facts to warrant the finding of the judge of the municipal court that the orders of the petitioner abolishing the offices were not made in good faith. *Held*, that the decision of the judge that the orders of removal were made without proper cause and in bad faith showed no error of law and was not reviewable on a writ of certiorari.

In the case described above, it was *pointed out* that the decision of this court upon the record presented was not to be taken as an intimation that either the petition or the return was correct in form, both of them containing defects to which no objection had been raised.

THREE PETITIONS, filed on December 23, 1916, by the commissioner of public works of the city of Boston, for a writ of certiorari to quash orders made by the respondent justice of the Municipal Court of the Dorchester District of the city of Boston under St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, reversing certain orders made by the petitioner and reinstating the other respondents respectively as supervisor of permits, division engineer of the sewer and water service and superintendent of main drainage, all of the public works department.

The three cases were heard together by *Braley*, J., who made a memorandum of decision containing the findings of fact that are stated in the opinion. The answer of the respondent justice "contained a full and complete record of the doings of the Dorchester court, including a complete typewritten copy of all the evidence."

The single justice refused to rule at the request of the respondents that under St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, the decision of the respondent justice of the Dorchester court was "final and conclusive upon the parties" and that the petitions could not be maintained.

The petitioner asked the single justice to rule that as a matter of law the writ should issue in each of the cases. The single justice refused to make this ruling. He found "that, while there may have been some evidence admitted which at the trial of an action at law would have been excluded, yet the material findings of fact appearing in the answer are supported by competent evidence. Nor does it appear that the [Dorchester] court adopted

any wrong standard of decision or that substantial justice has not been done."

The single justice ordered that in each of the cases the petition be dismissed; and the petitioner alleged exceptions.

St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, is as follows: "Every person now holding or hereafter appointed to an office classified under the civil service rules of the Commonwealth, except members of the police department of the city of Boston, of the police department of the metropolitan park commission, and except members of the district police, whether appointed for a definite or stated term, or otherwise, who is removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other, may, after a public hearing, as provided for by section two of chapter three hundred and fourteen of the acts of the year nineteen hundred and four, as amended by chapter two hundred and forty-three of the acts of the year nineteen hundred and five, and within thirty days after such hearing, bring a petition in the police, district or municipal court within the judicial district where such person resides, addressed to the justice of the court and praying that the action of the officer or board in removing, suspending, lowering or transferring him may be reviewed by the court, and after such notice to such officer or board as the court may think necessary, it shall review the action of said officer or board, and hear any witnesses, and shall affirm said order unless it shall appear that said order was made by said officer or board without proper cause or in bad faith, in which case said order shall be reversed and the petitioner be reinstated in his office. The decision of the justice of said police, district or municipal court shall be final and conclusive upon the parties."

J. P. Lyons, for the petitioner.

A. D. Hill, (*R. H. Wiswall* with him,) for the respondents.

CARROLL, J. The petitioner is the commissioner of public works of the city of Boston. Acting under the revised ordinances of the city, 1914, c. 28, he attempted to abolish the office of supervisor of permits of the public works department, which office was occupied by Storrs L. Durkee; the office of division engineer of the sewer and water service of the public works department, occupied by Frank A. McInnes, and the office of super-

intendent of main drainage of that department, occupied by Bliss W. Robinson, each of whom was entitled to such protection as the civil service laws of the Commonwealth afforded.

Thereupon Durkee, McInnes and Robinson, acting under St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, petitioned the Municipal Court of Dorchester District, being a "police, district or municipal court within the judicial district" where they resided, asking that the action of the commissioner be reviewed. Due notice was given and after hearing the witnesses and arguments of counsel, the respondent court reviewed the action of the commissioner and decided in each case that the order be reversed and the petitioner reinstated in his office. The commissioner then brought these petitions asking that a writ of certiorari issue quashing the order of reinstatement, that the judgment be reversed and the petitions dismissed. To the refusal of the single justice to rule that as matter of law a writ should issue, the commissioner, who is the petitioner for this writ, excepted.

It is contended by the respondents that a writ of certiorari will not lie to review the decision of a judge of the police, district or municipal court in a case arising under St. 1915, c. 251, in the absence of fraud or jurisdictional defect, this statute providing that "The decision of the justice of said police, district or municipal court shall be final and conclusive upon the parties."

The fact that the decision of the judge is final and conclusive does not deprive the parties of the right to have errors of law corrected by writ of certiorari. In *Swan* v. *Justices of the Superior Court*, 222 Mass. 542, it was decided that, notwithstanding the language of the statute then under consideration, "there shall be no appeal from his [the Superior Court judge's] decision," certiorari would lie to correct material errors of law, and it was there stated that "the word 'appeal' is used in a broad general sense, so as to cover all the ordinary proceedings for a revision by this court" p. 544. By declaring that the decision of the judge of the police, district or municipal court should be final and conclusive, the Legislature meant, in effect the same, as it did when it declared that the decision of a judge of the Superior Court should not be appealed from, for, where there is no appeal, ordinarily the finding stands and is final and

conclusive. The Legislature did not intend by the words "final and conclusive" to leave the parties without remedy if there were essential errors of law apparent on the record of proceedings, depriving them of substantial rights. The purpose of the Legislature was to make the judge's findings of fact final and binding on the parties. It was not its intention to prevent them from seeking the protection of this extraordinary writ if their rights were illegally invaded. *Swan* v. *Justices of the Superior Court, supra,* and cases cited.

The petitioner notified Durkee, Robinson and McInnes that their positions were abolished. It is not questioned that he has the right to do away with an unnecessary position, but as expressed in *Garvey* v. *Lowell,* 199 Mass. 47, 50, "There is a real and fundamental distinction between the laudable abolition of an unnecessary position and the discharge of a faithful employee in violation of the rights secured to him by statute; and the latter action can neither be concealed nor protected by a pretense that it was an exercise of the former right." The determination of the judge of the Municipal Court of the Dorchester District on the question whether Murphy really intended to abolish the positions, or was making this a mere pretence in order to deprive these men of their occupations and the rights given them by the civil service statute, in so far as it was a question of fact is conclusive, and cannot be reviewed by this court.

In a petition for certiorari to set aside the decision of a magistrate who has heard the evidence, the only matters open for our consideration under the statute are questions of law. We cannot set aside his findings of fact. Under the statute he was required to affirm the order of the commissioner "unless it shall appear that said order was made by said officer or board without proper cause or in bad faith." The Legislature has made him the sole judge of these facts and his findings thereon are final and conclusive on all the parties. "A writ of certiorari lies only to correct errors in law, and not to revise a decision of a question of fact upon the evidence introduced at the hearing in the inferior court, or to examine the sufficiency of the evidence to support the finding, unless objection was taken to the evidence for incompetency, so as to raise a legal question." *Farmington River Water Power Co.* v. *County Commissioners,* 112 Mass. 206, 212, 213. *Swan* v. *Jus-*

tices of the Superior Court, supra. Hogan v. *Collins,* 183 Mass. 43. "As a general rule the findings of the commissioners upon matters of fact will not be reviewed on certiorari." *Great Barrington* v. *County Commissioners,* 112 Mass. 218, 224.

The return, of the respondents, shows that the abrogation of the positions was not in good faith, but was a mere evasion of the statute. This answer, which is in the nature, not of a mere allegation or statement by the parties, but an official return, is conclusive on all matters of fact and stands as true. It sets forth sufficient facts to support the finding, *Worcester & Nashua Railroad* v. *Railroad Commissioners,* 118 Mass. 561, 564, *Mendon* v. *County Commissioners,* 5 Allen, 13, 16, and the decision, that the orders of removal were made without proper cause, shows no error of law and is not reviewable on certiorari.

There was an unwarrantable latitude both in the petition and in the return in the case at bar, the effect of which has not been argued and need not be decided. The practice was not in accordance with the rules laid down in *Farmington River Water Power Co.* v. *County Commissioners, supra,* and *Ward* v. *Aldermen of Newton,* 181 Mass. 432. See *Tewksbury* v. *County Commissioners,* 117 Mass. 563, 565; *Lowell* v. *County Commissioners,* 146 Mass. 403, 412. The decision on the record presented is not to be taken as an intimation that either the petition or the return was correct in form or substance.

We are unable to find any prejudicial error in the admission of evidence excepted to. *Onset Street Railway* v. *County Commissioners,* 154 Mass. 395, 400. Because the findings of fact of the judge of the Municipal Court of the Dorchester District are conclusive and final, no question of law is before us and the exceptions must be overruled.

So ordered.

EDMUND A. WHITMAN, trustee, *vs.* WILLIAM L. WHITNEY & others.

Middlesex. March 28, 1917. — July 3, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Devise and Legacy, Vested interests. *Trust. Will. Evidence*, Extrinsic affecting writings.

A testatrix by her will created a trust, the income of which should be divided between her two daughters, and provided "And if both my said daughters shall die leaving no child which shall attain the age of twenty-one years, then the whole of said deceased sisters share I give devise and bequeath to my" two sons. *Held*, that, at the death of the testatrix leaving two sons and two daughters surviving her, the two sons took a vested interest in the trust fund, and the share of each was transmissible by will or subject to distribution as property under the laws regulating the descent and distribution of intestate estates.

Where a will purports to dispose of all of the property of the testator, evidence is not admissible, for the purpose of showing that the will did not operate as to an interest of the testator under the will of his mother and that the deceased was intestate as to such interest, which tends to show that the testator was of the opinion and believed that he had no interest under his mother's will and that he was so advised by his attorney.

A testatrix by the eighth clause of her will created a trust in certain real estate, the income to be paid to her two daughters during their lives and to their children, if either should die leaving a child or children, until they reached twenty-one years of age, and, in case both daughters died without issue, that the interest in the real estate should become the property of her two sons. By an eleventh clause she provided that "the residue of my estate, both real personal and mixed" should be held "upon the same trusts and subject to the same mediate and final disposal as expressed in the eighth clause." Both sons, having survived their mother, died intestate before the daughters, the first son unmarried and without issue, and the second son, in 1891, without issue and leaving a widow and an estate which, after the payment of all debts and expenses of administration and exclusive of his interest in the trust fund under his mother's will, exceeded $10,000. *Held*, that by the provision of the eleventh clause of the will, which related to the "final disposal" of her property, the testatrix did not intend to control or direct the disposition of the residue of the trust estate after it had become vested in the sons; and therefore that the property, which under the will had vested in the second son at the death of the testatrix, on his death passed from him by the laws of intestate descent and distribution, and not under the will.

By Pub. Sts. c. 135, § 3, as amended by Sts. 1882, c. 141; 1885, c. 276, under the circumstances above described, the widow of the second son became entitled to one half of the interest which had vested in him under the above described provisions of his mother's will.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 13, 1916, by the trustee under the will of Susannah Whitney, late of Cambridge, for instructions.

Material portions of the eighth, tenth and eleventh clauses of the will were as follows:

"Eighth. I give devise and bequeath unto my sons Augustus Anson and Benjamin White, one undivided half part of all the real estate of which I shall die seized and possessed, situate in the town of Brookline aforesaid . . . upon the following trusts, viz, that they the said trustees & the trustees or trustee for the time being under these presents, after all incidental and necessary expenses attending the execution of this trust, together with a reasonable compensation to themselves for their services shall receive and apply the net interest and income of said premises, or of the proceeds thereof, to the sole and exclusive use of my two daughters Susan Elizabeth and Abigail White equally, for and during their natural lives. And in case either of my daughters should die, leaving a child or children who shall attain the age of twenty one years, then to convey deliver and pay over said deceased parent's share to said child or children as they respectively become of age equally, to have and to hold the same to him her or them their heirs and assigns forever; and if only one child of either of my said daughters, attain that age, then that such child shall have the whole of its parent's share. But if either of my daughters should die and leave no child who shall attain the age of twenty one years then I give devise and bequeath such deceased's share equally to be divided between the survivors of my children Augustus Anson, Benjamin White, Susan Elizabeth and Abigail White, but the share of said deceased sister's share so dying as aforesaid, to which either of my said daughters may be entitled as aforesaid, shall be held upon the same trusts as above expressed, but the share which either of my sons aforesaid may be entitled to out of either deceased sister's share, shall be held by them their heirs and assigns forever. And if both my said daughters shall die leaving no child which shall attain the age of twenty one years, then the whole of said deceased sisters shares I give devise and bequeath to my said sons Augustus Anson and Benjamin White, to have and to hold the same to them their heirs and assigns forever. But my will is that in case either of my said daughters die leaving a

child or children that the income of said deceased parent's share shall be appropriated to the support and education of such child or children until he she or they attain twenty one years, or until their death before that time."

"Tenth. I give devise and bequeath two undivided fourth parts of all the rest and residue of my estate, both real personal and mixed, of whatever kind, and wherever situate of which I may die seized and possessed, or to which I may be entitled at the time of my decease, unto my two sons Augustus Anson, and Benjamin White. To have and to hold the same to them their heirs and assigns forever.

"Eleventh. I give devise and bequeath the other two undivided fourth parts of the said rest and residue of my estate, both real personal and mixed, of whatever kind and wherever situate, of which I may die seized and possessed, or to which I may be entitled at the time of my decease, unto my sons Augustus Anson and Benjamin White. . . . upon the same trusts and subject to the same mediate and final disposal as expressed in the eighth clause of this my will, and with the same rights and powers and subject to the same duties and obligations as therein expressed . . ."

It appeared that Benjamin White Whitney had died in the year 1880 intestate, unmarried and without issue, leaving as his heirs at law and next of kin his two brothers, William L. and Augustus A. Whitney, and his two sisters, Susan E. W. Brackett and Abigail W. Whitney, later Abigail W. Howe; that Augustus A. Whitney had died on July 29, 1891, intestate and without issue, but leaving a widow Evelyn A. Whitney and as his heirs at law and next of kin William L. Whitney, Susan E. W. Brackett and Abigail W. Howe.

It also appeared that Susan E. W. Brackett had died in the year 1894, leaving a will and one codicil, which had been allowed and under which the Society for the Prevention of Cruelty to Children and the Meadville Theological School, defendants in this suit, were made the residuary legatees in equal shares, and that a final account of the executor showing distribution in full had been allowed by the Probate Court.

It further appeared that Abigail W. Howe, formerly Abigail W. Whitney, died on January 3, 1916, leaving a will and two codicils, under which Radcliffe College, a defendant in this suit, was

made the residuary legatee; and that her estate was amply sufficient to pay all debts and legacies, so that the residue of the estate will be a substantial amount. Proof of this will was allowed after rescript from this court stating the decision reported in *Whitman* v. *Whitney*, 225 Mass. 213.

Evelyn A. Whitney, the widow of Augustus A. Whitney, died in the year 1898 intestate, unmarried and without issue, leaving as her only heirs at law her sisters Lucy T., Caroline L., Ellen M. and Martha E. Sawyer, of whom Ellen M. and Martha E. Sawyer alone survive and are the administratrices of her estate and the sole heirs at law and next of kin of her and of their sisters.

William L. Whitney, Julia A. Wright and Lucy A. Whitney, defendants, are the sole heirs at law and next of kin of their father, William L. Whitney, the eldest son of the testatrix, who died on May 29, 1900, intestate, William L. Whitney being the administrator of his estate.

The ninth paragraph of the bill alleged that the estate which came into the hands of the plaintiff and of his predecessors was all real estate, or the proceeds from the sales of real estate, except certain securities received from the executors of the will of Susannah Whitney, the whole of which securities were appraised at the time of their receipt on February 17, 1869, at the sum of $14,004.75.

The suit was heard by *Pierce*, J., by whose order a final decree was entered on January 26, 1917, excluding the evidence described in the opinion and instructing the plaintiff that Ellen M. and Martha E. Sawyer as next of kin of Evelyn A. Whitney, deceased, the widow of Augustus A. Whitney, were entitled to five sixteenths of the personal property set out in the ninth paragraph of the bill of complaint, less such proportional part of the expenses of the administration and distribution of the estate in the hands of the plaintiff as might be allowed by the Probate Court upon his final accounting, and that such amount as so determined be paid over to said Ellen M. and Martha E. Sawyer; that after such payment, the residue of the trust fund in his hands, at the time of the final termination of the trust and the final distribution of the trust estate, be distributed, one third to Radcliffe College, one sixth each to the Meadville Theological School and the Society for the

Prevention of Cruelty to Children, one ninth each to William L. Whitney, Lucy A. Whitney and Julia A. Wright.

All of the defendants except Ellen M. and Martha E. Sawyer appealed.

E. A. Whitman, trustee, stated the case.

H. F. Atwood, (*E. Field* with him,) for William L. Whitney and others.

J. A. Lowell, for the Massachusetts Society for the Prevention of Cruelty to Children and the Meadville Theological School.

F. P. Cabot, for Radcliffe College.

F. T. Field, for Ellen M. and Martha E. Sawyer.

CROSBY, J. The will of Susannah Whitney was duly proved and allowed in the Probate Court for the County of Middlesex on February 25, 1868. Under the eighth and eleventh clauses thereof certain trusts were created, and as the last surviving life tenant has died the trust estates are now determined and the time has come for the final distribution of the estates held thereunder. The plaintiff, who is the trustee under the will, brings this bill in equity for instructions to determine to whom the estate in his hands and possession is to be distributed and in what proportions.

1. The will in clause eight contains the following provision: "And if both my said daughters shall die leaving no child which shall attain the age of twenty-one years, then the whole of said deceased sisters shares I give devise and bequeath to my said sons Augustus Anson and Benjamin White, to have and to hold the same to them their heirs and assigns forever."

Under this clause Augustus Anson Whitney and Benjamin White Whitney took at the death of their mother, the testatrix, remainders in a trust fund which were vested and the share of each was transmissible and descendible as property under the statutes regulating the descent and distribution of intestate estates. We do not understand that any contention is made to the contrary. *Whitman* v. *Whitney*, 225 Mass. 213. *Whitman* v. *Huefner*, 221 Mass. 265. *Springfield Safe Deposit & Trust Co.* v. *Dwelly*, 219 Mass. 65. *Bosworth* v. *Stockbridge*, 189 Mass. 266.

2. At the hearing before the single justice the appellants, William L. Whitney, Lucy A. Whitney and Julia A. Wright, made certain offers of proof which were in substance that the life tenants, Abigail W. Howe and Susan E. W. Brackett, were of the opinion

and believed that they had no title or interest in the trust property which they had power to dispose of by will, and that they were so advised by their attorney; that they never intended by their wills, respectively, to dispose of any part of the trust property. These appellants contend that under these circumstances, the interests of Mrs. Howe and Mrs. Brackett in the trust fund did not pass by their wills but, as to each, their respective interests in the trust estate was intestate property; and that if such trust property did pass to the legatees named in their wills that there is a resulting trust in favor of their respective heirs at law; and that with reference to the will of Mrs. Howe there was an express trust.

The single justice rightly excluded the evidence offered. The mistaken belief of Mrs. Howe and Mrs. Brackett that they owned only a life estate in the trust fund, which they did not intend to dispose of by will, cannot be shown to affect the validity of the bequests thereunder. *Polsey* v. *Newton*, 199 Mass. 450, 454. *Whitman* v. *Whitney*, 225 Mass. 213.

It follows that no part of the trust estate which vested in Mrs. Brackett and in Mrs. Howe was left undisposed of by their wills, but that their respective shares therein became vested in the legatees named in their wills.

3. Augustus Anson Whitney owned a vested interest in one half of the trust estate under the eighth and eleventh clauses of the will of his mother, Susannah Whitney. He also inherited from his brother Benjamin W. Whitney, who died intestate and unmarried, one eighth of the trust estate, so that upon his (Augustus') death in 1891, he owned five eighths of the trust fund. He died intestate without issue and left a widow, Evelyn A. Whitney.

An important question to be determined is, did the widow take as statutory heir of her husband any part of the trust estate? It is agreed in writing by the parties "that Augustus Anson Whitney referred to in the petition left personal estate at his death exceeding $10,000 in value in excess of debts and expenses of administration and exclusive of any interest in the trust fund created by the will of Susannah Whitney."

The contention is made by the defendants, Ellen M. and Martha E. Sawyer, who are the heirs at law and next of kin of Evelyn A. Whitney, that upon the death of Augustus A. Whitney, intestate

and without issue, a future interest in one half of the personal property belonging to the trust became vested in his widow under the eleventh clause of the will.

It is the contention of certain of the defendants, that the widow of Augustus never became entitled to any part of the trust fund, that as the eighth clause of the will created a trust which related solely to real estate, and as the interest of Augustus therein was a vested remainder in property held in trust, that his widow did not take as statutory heir. *Watson* v. *Watson*, 150 Mass. 84. *Baker* v. *Baker*, 167 Mass. 575.

The eleventh clause of the will created a trust in a portion of the "residue of my estate, both real personal and mixed," to hold "upon the same trusts and subject to the same mediate and final disposal as expressed in the eighth clause of this my will."

It is contended that the language quoted shows that the testatrix intended that the trust property included in the eleventh clause and consisting of real and personal property should be finally disposed of in accordance with the eighth clause, and that under the latter clause the estate consisting wholly of real estate went to the heirs at law of the sons to the exclusion of any right of the son's widow. In other words, it is the contention of the defendants who deny that any estate became vested in the widow, that the "final disposal" of the entire trust estate, both real and personal, was to be the same, and for that purpose was all to be treated as real estate. If so, it is plain that the widow took no part of the trust estate because at that time future interests in real estate did not vest in a widow. Pub. Sts. c. 135, § 3, as amended by St. 1882, c. 141, and St. 1885, c. 276.

The law has since been changed in this respect so that a widow may now take an interest in lands, although her husband held in his lifetime only an estate therein in remainder. R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256. *Walden* v. *Walden*, 213 Mass. 418.

The words above quoted from the eleventh clause of the will are not decisive against the contention of the defendants who claim that the widow took as statutory heir. Before his death Augustus A. Whitney had a vested remainder in a contingent equitable estate consisting of personal as well as real property. We are of opinion that such property, both real and personal, which passed

from Augustus at his death passed by descent and the laws of distribution, and not under the will of his mother, Susannah Whitney, and therefore that the provision above referred to in the eleventh clause of her will is not applicable to the descent and distribution of his estate. The eleventh clause which relates to the "final disposal" of the trust estate is to be construed to mean that only the life interests in the daughters of the testatrix, and remainders in their issue or in her sons, in her real and personal property described in the eleventh clause, should be the same as the real estate given by the eighth clause; she did not intend to control or direct the disposition of the residue of the trust estate after it had become vested in her sons, Augustus and Benjamin, the remaindermen.

The law relating to the distribution of personal estate as it existed in 1891, when the death of Augustus A. Whitney occurred, was contained in Pub. Sts. c. 135, § 3, as amended by St. 1882, c. 141, and St. 1885, c. 276.

"Sect. 3. When a person dies possessed of personal estate not lawfully disposed of by will, it shall be applied and distributed as follows: —

"Fifth. If he leaves a widow and no issue, the widow shall be entitled to the whole of the residue to the amount of five thousand dollars, and to one-half the excess of the residue above ten thousand dollars; . . ."

The provisions of the R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, extend the provisions of the Public Statutes to real estate and make certain other changes.

It is to be noted that so far as the question under consideration is concerned, the rights of the widow were substantially the same under Pub. Sts. c. 135, § 3, as amended, as under the R. L. c. 140, § 3, as amended.

In *Walden* v. *Walden*, *supra*, a case which was decided under R. L. c. 140, § 3, as amended by St. 1905, c. 256, it was held that the widow of a man who died intestate without issue takes a half interest in real estate in which her husband at the time of his death had a vested remainder, although subject to a life estate that terminated after his death. If under the statute a future interest in real estate passes to a widow, without doubt she would take such an interest in personal estate.

Under the statutes in force at the date of the death of Augustus A. Whitney, the right to a future interest in the personal estate of the fund passed to the widow and upon her decease became a part of her estate. *Buswell* v. *Newcomb*, 183 Mass. 111. *O'Brien* v. *Lewis*, 208 Mass. 515. *Walden* v. *Walden, supra*. *Whitman* v. *Huefner, supra*.

As her husband was entitled to five eighths of the trust fund, his widow had a future interest in one half of the personal estate, or five sixteenths thereof, which her heirs at law are now entitled to receive. *Buswell* v. *Newcomb*, 183 Mass. 111, 114. *Minot* v. *Purrington*, 190 Mass. 336, 342.

The plaintiff is instructed, as ordered by the single justice, that Ellen M. and Martha E. Sawyer, the next of kin of Evelyn A. Whitney, deceased, the widow of Augustus A. Whitney, are entitled to receive five sixteenths of the personal property set out in the ninth paragraph of the bill less such proportional part of the expenses of the administration and disposition of the estate in the hands of the petitioner as may be allowed by the Probate Court upon his final accounting, and that such amount as so determined is to be paid over to Ellen M. and Martha E. Sawyer; that after such payment, the residue of the trust fund in his hands at the time of the final determination of the trust estate, is to be distributed one third to Radcliffe College, one sixth each to the Meadville Theological School and the Society for the Prevention of Cruelty to Children, and one ninth each to William L. Whitney, Lucy A. Whitney and Julia A. Wright.

Decree affirmed.

LOUISA S. HOLBROOK, executrix, *vs.* MARY J. SEAGRAVE & another.

Worcester. April 13, 1917. — July 3, 1917.

Present: LORING, BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Witness. Attorney at Law. Probate Court, Trial of issues by jury on appeal, Exceptions. *Evidence*, Opinion, Of mental capacity, Of undue influence, Presumptions and burden of proof.

A single justice presiding at the trial before a jury in the Supreme Judicial Court, on an appeal from a decree of the Probate Court allowing the will of a woman,

of issues relating to the execution and validity of the will, in the exercise of his discretion may permit an attorney at law who drew the will and who has made the opening statement to the jury in behalf of the proponent of the will to testify as a witness for the proponent, although such practice is not to be commended.

At the trial above described, an opinion as to the capacity of the testatrix, formed by one of the attesting witnesses who had not previously known the testatrix after talking with the other attesting witnesses subsequently to the time of the execution of the will, where such witness states that she has no opinion based solely upon what she observed at the time the will was signed, is not admissible in evidence.

It appeared that the trial above described occupied four days. The appellants excepted to the exclusion of certain evidence in the nature of declarations by the testatrix, which was offered to show affection or dislike of the testatrix for certain relations and her interest in her church and in a charitable corporation. The bill of exceptions did not purport to contain all the material evidence at the trial. *Held*, that the exceptions must be overruled because it did not appear that the exclusion of the evidence was an improper exercise of the discretion of the presiding justice in the exclusion of declarations of the testatrix remote in time, trivial in importance or merely cumulative.

No exception lies to a refusal to give as an instruction to a jury a ruling requested which is argumentative in form and relates only to a part of the evidence upon the subject of which it treats.

It is a reasonable inference from the fact that a testator voluntarily signed a will that he knew its contents.

A request for an instruction to a jury involving three or more independent subjects properly may be refused for that reason.

At the trial above described, there was evidence tending to show that the chief beneficiary under the will was a sister of the testatrix and that her husband was the attending physician of the testatrix, that the will was executed at a hospital to which the testatrix had been taken by such physician, that he consulted with the hospital physician and visited her while there, and that the testatrix died at the hospital nineteen days after the will was executed. *Held*, that while the mere existence of confidential relations between the physician and the testatrix would not prevent the physician's wife from being a recipient of the bounty of the testatrix and the jury might find that the provision made for her sister by the testatrix was not induced by any undue influence exerted by the physician, nevertheless the contestants were entitled to have the jury instructed that the law views with jealousy relations of this nature between a physician and his patient, especially where the patient is enfeebled by disease.

At the trial above described, there was no issue framed, and the contestants did not ask for any rulings, with reference to the conduct of the attorney who drew the will, on the theory that he was acting as agent for the chief beneficiary; and the presiding justice instructed the jury that no question arose as to whether the will was procured to be made by the attorney. The contestants alleged an exception to this portion of the charge. *Held*, that the exception must be overruled.

Where, after a jury has retired and the justice who presided at the trial has gone to his home, the jury return and ask for further instructions which the Chief Justice of the court, who was not present at the trial, gives to them subject to

exceptions of one of the parties, such exceptions cannot be considered by this court on a bill of exceptions allowed by the justice who presided at the trial; but must be presented by a bill allowed by the Chief Justice.

APPEAL from a decree of the Probate Court for the county of Worcester allowing the will of Harriette A. Whitmore.

Issues, described in the opinion, were framed and the case was tried before *Crosby*, J. It appeared that the testatrix was taken to the Memorial Hospital at Worcester at the suggestion of her physician, Silas P. Holbrook, husband of Louisa S. Holbrook, the principal beneficiary under the will, on September 8, 1915, that the will was executed on September 28 at the hospital, three hospital nurses being witnesses, and that the testatrix died there on October 17, 1915. Other material evidence, the course of the trial, requests of the appellants for rulings and rulings by the single justice and exceptions by the appellants are described in the opinion.

The portions of the charge to which the appellants' nineteenth exception related was as follows: "There has been some suggestion in the argument in reference to the acts of Mr. Brady, the attorney who made this will, some suggestion with reference to his conduct in this matter. In reference to that, gentlemen, I want to say that no question arises in this case as to whether this will was procured to be made by Mr. Brady, and you should leave that out of the case. There is no question raised upon these issues concerning any influence which may have been exercised if any by Mr. Brady. The sole question in this case is upon this question whether this will was procured to be made by reason of undue influence of either the doctor or Mrs. Holbrook, and nobody else. That is the only question. Those are the only persons whose influence is to be considered in connection with answering this third question."

The issues were answered favorably to the proponents of the will; and the appellants alleged exceptions.

The case was argued at a special sitting of this court on April 13, 1917.

A. E. Seagrave, (*F. W. Morrison* with him,) for the appellants.

E. H. Vaughan, for the executrix.

DE COURCY, J. Harriette A. Whitmore died October 17, 1915; and this is a contest over her will, which was executed on September 28, 1915. The trial by jury in the Supreme Judicial Court

was on the usual issues of execution, soundness of mind and undue influence. The verdict sustained the will, and the case is before us on exceptions taken by the contestants in the course of the trial.

1. There were seven exceptions relating to the admission of evidence. The first exception was to the refusal to exclude from the witness stand the attorney who drew up the will, on the ground that he had made the opening statement to the jury. While such a practice by an attorney is not to be commended, it was within the discretion of the single justice to permit the witness to testify. *Potter* v. *Ware*, 1 Cush. 519, 523. The second exception was as follows: One of the attesting witnesses was asked, "Have you an opinion as to whether Mrs. Whitmore was of sound and disposing mind and memory on the twenty-eighth of September formed since that date and formed on things you then and there saw and heard?" She answered, "Yes, after talking with other nurses;" but that she did not know Mrs. Whitmore, and had no opinion based solely upon what she observed at the time the will was signed. The witness then was asked her opinion, but on objection it was excluded. Such opinion of the testator's capacity formed subsequently to the time of executing the will was not admissible. *Williams* v. *Spencer*, 150 Mass. 346. Exceptions three, four, five, six and seven are to the exclusion of offers of evidence in the nature of declarations by the testatrix to show the affection or dislike of the testatrix for certain relatives, her interest in her church and in the Daughters of the Revolution. While some of this evidence, standing alone, might tend to throw light on the mental condition of the testatrix, we cannot say that there was error in its exclusion. Much must be left to the discretion of the presiding judge in excluding declarations of the testatrix that are remote in time, trivial in importance or merely cumulative; and the bill of exceptions does not purport to contain all the material evidence heard during the four days trial. Besides, it was admitted by the proponents in the presence of the jury that the testatrix had an extreme affection for her sister Mrs. Capron, who was not a contestant.

2. Exceptions numbered eight to eighteen inclusive are to the refusal to give certain instructions requested by the contestants. The eighth selected and stated in argumentative form a part of the evidence relative to the attorney who wrote the will. The

justice was not obliged to instruct the jury in the form requested. *Richardson* v. *Bly*, 181 Mass. 97. The latter part of request nine belonged with the eighth, and had the effect of an argument rather than a statement of law when attached to the proposition dealing with the knowledge by the testatrix of the contents of the will. As to the main portion of the request, it is to be presumed from the execution of the will that the testatrix knew the contents, unless affirmative evidence to the contrary was introduced. *Dunham* v. *Holmes*, 225 Mass. 68, 72. The testimony of the subscribing witnesses went far enough to show that the testatrix understood that she was executing her will. Request ten involved three or more independent subjects and was objectionable on that ground. The chief element, calling attention to the physical and mental condition of the testatrix, as bearing on her susceptibility to undue influence, was covered by the charge.

The eleventh and twelfth requests expressly, and the fourteenth inferentially, called attention to the confidential relation of patient and physician existing between the testatrix and Dr. Silas P. Holbrook, husband of the principal beneficiary under the will. There was evidence that he was her attending physician before she went to the hospital; and that he consulted with the hospital physician and visited the testatrix while she was an inmate. Although the contestants were not entitled to instructions in the exact form proposed, they were entitled to have the law on this subject stated to the jury, in view of the facts disclosed as to the physician's conduct and interest. The mere existence of such confidential relation would not as matter of law prevent the physician, much less his wife, from being the recipient of the bounty of the testatrix, and the jury might find that the provision made by the testatrix in favor of her sister Mrs. Holbrook was not induced by any influence exerted by Dr. Holbrook. Nevertheless the contestants were entitled to have the jury instructed as to the jealousy with which the law views transactions of this kind between physician and patient, especially when the patient is enfeebled by disease. *Woodbury* v. *Woodbury*, 141 Mass. 329. *Phillips* v. *Chase*, 203 Mass. 556. *Butler* v. *Gleason*, 214 Mass. 248. As no instructions were given to the jury on this subject matter, the exceptions to the refusal to give the requests eleven and twelve, in form or substance, must be sustained.

In view of this result there is no occasion to discuss the remaining requests at length. The thirteenth was objectionable in form, and the general subject of undue influence was adequately treated in the charge. The same is true of the fifteenth. The sixteenth was not called for, as all the attesting witnesses testified before the jury. See *Baxter* v. *Abbott*, 7 Gray, 71. The matters embraced in the two remaining requests were amply dealt with in the instructions to the jury.

3. The nineteenth exception to a portion of the charge is overruled. If the contestants desired instructions with reference to the conduct of Mr. Brady on the theory that he was acting as the agent of Dr. or Mrs. Holbrook, they should have made written requests therefor.

4. After the justice who presided over the trial had gone to his home, the Chief Justice, who was not present at the trial, at the request of the jury, gave them further instructions, and an exception was taken to this action. Without intimating that there is any merit in the objection, it cannot be considered on this bill of exceptions. The Chief Justice was presiding at the trial when this exception was taken; and a bill of exceptions setting it forth could be allowed by him alone, except in circumstances not here existing. R. L. c. 173, § 108.

As already appears, all the exceptions taken at the trial must be overruled except those to the refusal to give in form or substance the eleventh or twelfth requests for instructions. In consequence of that refusal the entry must be

Exceptions sustained.

SOLOMON BROWN'S CASE.

Suffolk. December 5, 1916. — July 5, 1917.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Knowledge of the injury, Procedure. *Superior Court.*

The provision of the workmen's compensation act contained in St. 1911, c. 751, Part III, § 18, which makes it the duty of an employer, who is a subscriber, to "keep a record of all injuries," and "within forty-eight hours . . . after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the Industrial Accident Board," requires the employer to

find out and report the facts of each injury, not to make a report of claims or statements of injuries.

Such a report made to the Industrial Accident Board by the timekeeper of a construction company, which was a subscriber under the act, that the employee "ruptured himself about three weeks ago and just began to feel the effects of it the last few days," is evidence warranting a finding under St. 1911, c. 751, Part II, § 18, that the subscriber had knowledge of the injury which made a notice under § 15 unnecessary.

In order that such knowledge should dispense with the necessity of notice it must be shown to have existed within the time when a notice in writing, if required, should have been given, that is, as soon as practicable after the happening of the injury. Following *Jeremiah Murphy's Case*, 226 Mass. 60.

In a claim under the workmen's compensation act of compensation for an injury by a rupture, there was evidence that a rupture of the kind which the employee had does not manifest itself immediately upon the strain which causes the rupture and that in an ordinary case of this kind it would not develop for two or three weeks after the strain. It appeared that the injury to the employee first manifested itself on the eighteenth day of a certain month by a swelling in the employee's groin and that this proved to have been the result of a strain sustained by him on the first day of the month. It appeared also that the employer had knowledge of the injury on the twenty-second day of the month. *Held*, that a finding was warranted that the injury occurred on the eighteenth day of the month and that the subscriber had knowledge of it as soon as practicable after the happening thereof.

On an appeal to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board, when copies of the decision of the board and all papers in connection therewith have been transmitted to the Superior Court it is the duty of that court to take such action and to make such a decree as the law requires on the facts found by the board. The Superior Court has jurisdiction over the claim to compensation in the same way and to the same extent that it has over a suit in equity pending in that court in which the facts have been found by a master. Following *McNicol's Case*, 215 Mass. 497.

In an appeal to the Superior Court from a decision of the Industrial Accident Board on a claim under the workmen's compensation act, where the record shows that the insurer asked the Industrial Accident Board for certain rulings, the making of which would have resulted necessarily in a decision that the employee was entitled to no compensation, and further shows that the board without referring expressly to the requests for rulings made an award of compensation to the employee, it must be taken on this record that the insurer's requests for rulings were refused, and there is no occasion to remit the report to the Industrial Accident Board in order that the board may state whether they granted or refused the requests.

Where on an appeal to the Superior Court in a proceeding under the workmen's compensation act the insurer moved that the report be recommitted to the Industrial Accident Board in order that a portion of certain testimony which the board on review had ordered should be stricken from the record should "be set out verbatim or indicated by page and line of the testimony," and the judge denied the motion, it was *held*, that, if it was necessary to state what the evidence was which was stricken out, a statement of such evidence would be sufficient,

and that it would not be necessary that the testimony should "be set out verbatim or indicated by page and line," so that the motion was denied properly.

Where in a proceeding under the workmen's compensation act the record showed that at the hearing before the arbitration committee the insurer requested "that the typewritten testimony submitted by the insurer be embodied in the evidence in the report" and the record stated that "in place thereof a verbatim transcript, by the board's stenographer, of the evidence given by the employee is attached hereto. The extracts of the testimony of Dr. R as furnished by the insurer are attached as corrected," and where the extracts mentioned were all the evidence introduced by the insurer, it was *held*, that the action of the committee gave the insurer all its rights.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board, in which they found "that the employee, Solomon Brown, received a personal injury which arose out of and in the course of his employment as a laborer for the subscriber, the Aberthaw Construction Company, on or about October 1, 1915, by reason of a strain sustained while assisting to carry a 'stick' weighing about seven hundred pounds, said strain causing a condition of hernia to develop and resulting in the total incapacity for work of the employee from November 2, 1915, to March 17, 1916, a period of nineteen and three sevenths weeks; that the average weekly wages of the employee were $16.20; that compensation is due him at the rate of $10 a week for the period above referred to, a total sum of $194.29 being due on account of the incapacity resulting from the injury; and that all incapacity caused by the injury ceased on March 17, 1916."

The case was heard by *Lawton*, J. The proceedings and the evidence are described in the opinion. The insurer's requests for rulings, which were presented to the Industrial Accident Board as mentioned in the opinion, in regard to which the board took no action except by their decision, were as follows:

"1. It is not a reasonable notice under the act for the employee, who has sustained a strain on or about October 1, 1915, and who feels a hernia on getting out of bed October 18, to orally notify the timekeeper and party responsible for reporting accidents, on October 22, that "he ruptured himself about three weeks ago and just began to feel the effects of it the last few days."

"2. If all that the employer knew of the alleged accident to Solomon Brown was that he stated to the officer in charge of

reporting accidents, on October 22, that the said employee ruptured himself about three weeks before and just began to feel the effects of it the last few days, it is not knowledge of the accident within the meaning of the act.

"3. The notice given by Solomon Brown, as appears in the finding of the arbitration committee, is not proper notice under the act.

"4. The knowledge by the employer of the accident to Solomon Brown, as appears in the findings of the arbitration committee, is not sufficient knowledge of the accident under the act, and does not excuse the notice required under the act.

"5. The evidence that on October 1, 1915, the employee after being engaged with seven other men in moving a heavy timber, felt all tired out and did not notice any pain, felt kind of weak, the weakness passed away, and he 'didn't mind no more to it,' and that he made no complaint to anybody at that time and kept right along at work and continued to work as a laborer, is not sufficient evidence that it was the cause of a slight hernia, as described in the testimony, and which he felt for the first time on getting out of bed on the morning of the eighteenth day of October."

The insurer made the following motion, referred to in the opinion:

"Now comes the insurer in the above entitled action and moves that the above case be remitted to the Industrial Accident Board for amendment in the following particulars:

"1. That the requests for rulings one, two, three, four and five, inclusive, made by the insurer before the Industrial Accident Board on review be passed on, and either granted or refused.

"2. That that portion of the testimony which the Industrial Accident Board on review state they have stricken from the record be set out verbatim or indicated by page and line, of the testimony."

This motion was denied by the judge as follows: "July 11, 1916, motion denied by the court after hearing, on the ground that the court has no authority to make the order asked for."

On the same day by order of the judge a decree was entered in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

The case was submitted on briefs.

N. F. Hesseltine & J. F. Scannell, for the insurer.

J. Abbott, for the employee.

LORING, J. The employee here in question worked for the Aberthaw Construction Company in the yard of the Fore River Ship Yards. When he woke up on the morning of October 18, 1915, he found that he had a swelling in his right groin and that he was unable to work. He consulted his doctor and was advised that he had ruptured himself and that an operation was necessary. On his telling the doctor that he was a day laborer and had a family to support the doctor told him that he could try using a truss. Thereupon he bought a truss and worked on the three following days having arranged with the foreman (whom he told of the situation) for lighter work. On the twenty-second he reported his situation to the timekeeper of the construction company. The timekeeper took him to Dr. Blanchard, the physician at the hospital of the Fore River Ship Yards. Dr. Blanchard examined him and he also advised him that he had a rupture. On the same day the timekeeper, acting for the construction company, made a report of the injury to the Industrial Accident Board. In this report he stated that "he [the employee] ruptured himself about three weeks ago and just began to feel the effects of it the last few days." Opposite Sec. E 2 of the blank calling for "Nature of injury, as near as possible" he wrote in the word "Rupture" and opposite E 3 calling for "Attending physician or hospital where sent, name and address" he filled in "Dr. Blanchard, Howard Ave., Quincy." On November 17 the employee was operated on at the Massachusetts General Hospital for indirect inguinal hernia. Thereafter he was incapacitated for work until March 17, 1916.

When he found the swelling, the employee remembered that, on or about October 1, he was assisting in carrying a piece of timber weighing some seven hundred pounds and that at that time he and another man carried one side of the stick and six men carried the other side. Although at the time he did not think that he was hurt thereby, when he found he had the rupture he remembered that "When he got through he felt all tired out. He did not feel a pain but felt kind of weak; the weakness passed away and he did not mind any more about

it." The doctors testified that a strain of that kind would be likely to produce an indirect inguinal hernia. They also testified that hernia of that kind would not ensue directly upon the strain but would be likely to result in the course of two or three weeks. The Industrial Accident Board made a finding in accordance with the above evidence and awarded the employee one half of his weekly wages from November 2, 1915, to March 17, 1916, amounting to the sum of $194.29 and a decree to that effect was made by the Superior Court. From that decree the insured took the appeal which is now before us.

The insurer has conceded that the findings of the Industrial Accident Board were warranted, but it has contended that the plaintiff is barred because he failed to give notice of the accident as required by St. 1911, c. 751, Part II, § 15. To avoid this defence the employee has relied upon the fact that the subscriber "had knowledge of the injury" and the Industrial Accident Board found that it did.

1. At the hearing before the board the insurer contended that the evidence did not warrant the finding that the subscriber "had knowledge of the injury" and therefore that the five requests asked for by it, and printed above, should have been given. In support of this contention the learned counsel for the insurer has argued at great length that where the employee gives the employer notice of an injury by word of mouth it cannot be said that the employer has knowledge of the injury. And further, that a report of an injury by the employer based upon an oral notice of it given by the employee does not make out knowledge of the injury on the part of the employer. Of course that is so. Of course it is true that oral notice is not knowledge. Also it is of course true that in a case where all that is stated by the employer in a report to the Industrial Accident Board is that he had had oral notice of an injury it cannot be said that the report makes out knowledge on the part of the employer. In the argument made by him the insurer's counsel has overlooked the fact that by § 18 of Part III of the workmen's compensation act it is made the duty of the employer to "keep a record of all injuries" and "within forty-eight hours . . . after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the Industrial Accident Board." The duty of the employer under this

section is to make an investigation, find out the facts and to "keep a record of" the facts, and having found out what the facts are then within forty-eight hours make a report of them to the Industrial Accident Board. The employer's duty is not to make a report of claims of injuries, but to find out and report the facts of each injury.

In the report in the case at bar the subscriber (the Aberthaw Construction Company) performed its duty. It reported as a fact that "he [the employee] ruptured himself about three weeks ago and just began to feel the effects of it the last few days."

In addition to that it affirmatively appears in the case at bar that this statement of the employer that "he [the employee] ruptured himself about three weeks ago" was a statement of fact founded upon an investigation and was not a statement that the petitioner asserted that he had ruptured himself. The timekeeper (who acted for the construction company in making the report which it was bound to make under Part III, § 18), testified that "he believes the doctor [referring to Dr. Blanchard, the physician of the Fore River Ship Yards hospital, who was the second doctor to examine the employee] said Brown had a rupture." We do not intimate that it was necessary for the employee to produce affirmative evidence that the report of the employer was founded upon information obtained by it and was not founded upon an oral notice of the claim. Neither do we intimate that it would have been permissible for the employer to have shown by evidence that that was not so. The report is in and of itself a statement of the fact that the employee "ruptured himself." We refer to this testimony of the timekeeper because it shows that there is no foundation for the argument put forward by the insurer's counsel. The case comes within *Bloom's Case*, 222 Mass. 434; *McLean's Case*, 223 Mass. 342; *Carroll's Case*, 225 Mass. 203; *Jeremiah Murphy's Case*, 226 Mass. 60.

Knowledge on the part of the employer is a substitute for the written notice required by St. 1911, c. 751, Part II, § 15, and the employer must have knowledge within the time when written notice should have been given, namely "as soon as practicable after the happening" of the injury. *Jeremiah Murphy's Case*, 226 Mass. 60. In the case at bar there was evidence that a rupture of the kind which the employee had does not manifest itself immediately upon the strain which causes the rupture and

that in the ordinary case it would not develop for two or three weeks after the strain. It follows that the injury took place on October 18 when the rupture manifested itself by the swelling in the employee's groin and not on October 1 when he strained himself. *Johnson's Case*, 217 Mass. 388. The injury therefore occurred on October 18 and the employer had knowledge of it on or before October 22. It follows that the first, second, third, fourth, and fifth requests for rulings were rightly refused.

2. The insurer made a motion before the Superior Court that the case be remitted to the Industrial Accident Board for amendment in two particulars, namely: (1) that the board should state whether they granted or refused the requests for rulings one, two, three, four and five; and (2) that a portion of certain testimony which the Industrial Accident Board on review ordered should be stricken from the record should "be set out verbatim or indicated by page and line, of the testimony." This was denied by the judge "on the ground that the court has no authority to make the order asked for." The motion was denied rightly. But the reason given by the Superior Court for denying the motion was wrong.

The Superior Court did have authority to make the order asked for. When copies of the decision of the board and all papers in connection therewith have been transmitted to the Superior Court, it is the duty of that court to take such action and make such a decree as the law requires on the facts found by the board. It is for the Superior Court to determine what order or decree ought to be made on the facts found. It has jurisdiction over the case in the same way and to the same extent that it has for example in a suit in equity where the facts have been found by a master. This was fully set forth in *McNicol's Case*, 215 Mass. 497.

On the record the requests for rulings one, two, three, four and five must be taken to have been refused. As to the testimony which was stricken from the record by the board it was stated what that evidence was. If it was necessary to state what the evidence was which was stricken out that was enough. It was not necessary that it should "be set out verbatim or indicated by page and line" in any event.

3. Before the arbitration committee the insurer requested "that the typewritten testimony submitted by the insurer be

embodied in the evidence in the report." It is stated in the report that "in place thereof a verbatim transcript, by the board's stenographer, of the evidence given by the employee is attached hereto. The extracts of the testimony of Dr. Ripley as furnished by the insurer are attached as corrected." This was all the evidence introduced by the insurer. This action of the committee gave the insurer all its rights.

4. The principles involved in the questions raised by the insurer are established by previous decisions of this court and it is not necessary to consider cases from other jurisdictions.

Decree affirmed.

RALPH W. ELLIS, executor, *vs.* ISABELLE A. B. HUNT & others.

Hampden. March 23, 1917. — July 11, 1917.

Present: RUGG, C. J., DE COURCY, CROSBY, & PIERCE, JJ.

Compromise of Controversy Concerning Will.

It here was *pointed out* that a compromise of a controversy concerning a will which the court may authorize under R. L. c. 148, § 15, is not a modification of the will but is merely an agreement of the parties interested, who, if they all are ascertained and in being and of age, can make such an agreement that will be binding irrespective of the statute.

The court has no jurisdiction under R. L. c. 148, § 15, to authorize an executor to adjust by compromise a controversy concerning a will by an agreement to which trustees to whom property is devised and bequeathed by the will are not parties.

PETITION, filed in the Supreme Judicial Court on January 8, 1917, under R. L. c. 148, § 15, by the executor of the will of Everett H. Barney, who died on March 31, 1916, for the authorization of a proposed compromise of a controversy regarding the allowance of that will and a codicil thereto.

On January 9, 1917, Charles E. Ladd and Theodore W. Leete, named as trustees in the will and codicil of Everett H. Barney, filed an intervening petition for leave to become parties respondent in the proceeding and on the same day their petition was allowed. Thereafter the intervening respondents Ladd and Leete filed the following plea:

"And now come Charles E. Ladd, of Springfield, in said county of Hampden, and Theodore W. Leete, of Longmeadow, in said county, and to the above named petition plead and say that they, together with one Walter P. Dodge, of said Springfield, are named as trustees in the instruments purporting to be the last will of Everett H. Barney and codicil thereto, mentioned in the first paragraph of said petition, that by said instruments said Everett H. Barney gave, bequeathed, and devised to them all the rest, residue and remainder of his property remaining after the payment of a specific bequest of one thousand dollars ($1,000) in trust for certain purposes named in said instruments, as appears by copies thereof, annexed to the above named petition and marked 'A' and 'B'; that they are devisees and legatees under said instruments, and that their interests as such devisees, legatees and trustees will be affected by the proposed agreement of compromise, a copy of which is annexed to the said petition and marked 'C';

"And they further plead and say that this honorable court has no jurisdiction to approve, ratify or confirm the said petition, or to grant the relief prayed for by said petition, because,

"First: They, the said Charles E. Ladd, Theodore W. Leete and Walter P. Dodge are not parties to the said agreement of compromise, and have not assented and do not assent thereto, as required by law and hereby expressly refuse to assent thereto;

"Second: Because this honorable court has no jurisdiction to compel them as such trustees, devisees or legatees, or as persons named as trustees, devisees or legatees as aforesaid, to assent to said compromise agreement or to become parties thereto;

"Third: Because the said agreement of compromise assumes to settle not only controversies between persons who claim as devisees and legatees under said instruments purporting to be the will of Everett H. Barney and codicil thereto, and the persons entitled to the estate of the deceased under the statutes regulating the descent and distribution of intestate estates, which are the only controversies that can be compromised under the provisions of R. L. c. 148, § 15, and acts in amendment thereof and in addition thereto; but also controversies which cannot be compromised except after the said instruments shall have been allowed as the will of said Everett H. Barney, and after the executors and trustees named therein shall have taken upon

themselves the performance of their respective duties under said will; that many of the provisions of the agreement of compromise affecting the interests of them, the said Ladd and Leete, as devisees, legatees and trustees as aforesaid, and particularly the provisions thereof which eliminate them as devisees, legatees and trustees under said instruments are of the class which cannot by law be compromised at this time and under said petition; and that as to said controversies the provisions of said agreement of compromise and the petition for the approval thereof are premature, and this honorable court is without jurisdiction to approve, ratify or confirm the same.

"Fourth: Because the said agreement of compromise assumed to impose upon the city of Springfield, a municipal corporation, certain trusts and the conduct of certain business enterprises, among which are the determination of the sum or sums of money to be paid to Adella V. Barney, the conduct and management of the real estate of the said Everett H. Barney, situated in the States of Massachusetts and Florida and elsewhere, and the conduct and management of a business corporation engaged in the manufacture of skates for profit, which trusts and enterprises are all beyond the powers of the said municipal corporation and against the policy of this Commonwealth respecting the same; and this honorable court is without jurisdiction or authority in law to approve, ratify or confirm the said agreement of compromise."

The case was heard by *Braley*, J. The respondents Ladd and Leete contended and asked the single justice to rule that they were "devisees or legatees whose interests" would be affected within the meaning of R. L. c. 148, § 15, by the proposed compromise and that, they not having assented thereto, the petition for compromise should be dismissed. At their request and with the assent of the petitioner, the single justice reported the case for determination by the full court, concluding his report as follows:

"In so far as any matter of discretion is involved, I should approve the compromise; but, if as matter of law the contention of the respondents is right, the petition is to be dismissed without costs and without prejudice. If their contention is wrong, a decree is to be entered confirming the compromise."

R. L. c. 148, §§ 15, 16, are as follows:

"Section 15. The Supreme Judicial Court shall have jurisdiction in equity to authorize the persons named as executors in an instrument purporting to be the last will of a person deceased, or the administrators with such will annexed, to adjust by arbitration or compromise any controversy between the persons who claim as devisees or legatees under such will and the persons entitled to the estate of the deceased under the statutes regulating the descent and distribution of intestate estates, to which arbitration or compromise the persons named as executors, or the administrators with the will annexed, as the case may be, those claiming as devisees or legatees whose interests will in the opinion of the court be affected by the proposed arbitration or compromise, and those claiming the estate as intestate, shall be parties."

"Section 16. If the court finds that any future contingent interests, which would arise under said will if admitted to probate, would be affected by the arbitration or compromise, it shall appoint some person or persons to represent such interests in such controversy, and the court shall have like power as to any bequests made in the will for charitable purposes, if no trustees have been appointed in such will; in both cases with such conditions as to costs as the court orders."

St. 1903, c. 222, gives the Probate Court concurrent jurisdiction of such cases.

W. H. Brooks & E. H. Brewster, for the petitioner.

C. H. Beckwith, for the City of Springfield.

S. L. Whipple, (*A. Lincoln* with him,) for the respondent Hunt.

W. H. McClintock, for the intervening respondents Ladd and Leete.

RUGG, C. J. This is a petition for authority to compromise a controversy respecting the probate of a will. Everett H. Barney died leaving two instruments, in form a will and codicil, whereby most of a large estate was given to three trustees upon elaborate trusts chiefly for the benefit of a park in the city of Springfield. A controversy as to the allowance of the will and codicil arose between the heirs at law and the executor. That controversy has been composed by an agreement to which confessedly all those interested are parties, including the Attorney General as representing the public, except those appointed trustees by the will. The question presented on this record is

whether such trustees are necessary parties to a proceeding under R. L. c. 148, § 15, asking the court to approve the compromise of such a controversy.

The purpose, operation and effect of that statute have been stated in several cases. *Elder* v. *Adams*, 180 Mass. 303. *Abbott* v. *Gaskins*, 181 Mass. 501. *Hastings* v. *Nesmith*, 188 Mass. 190. *Brandeis* v. *Atkins*, 204 Mass. 471. *Baxter* v. *Treasurer & Receiver General*, 209 Mass. 459. *Sherman* v. *Warren*, 211 Mass. 288. *Neafsey* v. *Chincholo*, 225 Mass. 12, 15. *Renwick* v. *Macomber*, 225 Mass. 380, 384, 385. The effect of these decisions as applied to the facts here presented is that proceedings under the statute are anomalous and its terms must be strictly complied with or there is no jurisdiction in the court to approve the agreement. The agreement for compromise, even when approved by decree of the court, is not in any accurate sense a modification of the will. The will as an entirety and in all its parts is established and admitted to probate. The court does not undertake to admit to probate a part of the will and to refuse to allow another part. But the agreement whereby the heirs at law on the one side and the devisees and legatees on the other have modified their rights under the will, is made matter of public record, its validity is approved by the court, and the duty of carrying out its terms is placed on those executing the will. The agreement is not incorporated into the will. The will stands by itself. Although the practice is to insert a clause in the decree of the court to the effect that the estate is to be administered in accordance with the agreement, yet the rights of the parties so far as they rest upon the agreement are contractual and not testamentary. The concessions made on the one side and accepted on the other take effect not because that is the will of the testator, but because that is the agreement of the parties. The changes wrought in the disposition of the property are not the result of changes in the will, but of concessions by the beneficiaries under the will to the heirs at law or among themselves as to the disposition to be made of the interests granted by the will. It is a change made, not in the expression of the will but in the volition of legatee or devisee as to what he is to do with the benefaction which he has received under the will. The Legislature has never undertaken to permit heirs at law and legatees to make a new will for a testator. There would be

a certain anomaly in recognizing testamentary power and in providing at the same time that after the maker of the will had died and his testamentary power gone forever, his disposition might be entirely frustrated. That would be a quite different matter from facilitating the making of valid contracts by competent legatees and devisees as to what they will do with that which they may receive under a will, subject to the supervisory power of the court to see that such contracts are just and reasonable toward all interests whether in being or future and contingent. Agreements of this nature are entirely valid outside of the statute. Their binding character as contracts has been recognized and enforced in equity both before and since the enactment of any statute authorizing courts to approve them. *Leach* v. *Fobes*, 11 Gray, 506. *Blount* v. *Wheeler*, 199 Mass. 330.

The statute by its terms does not go to the extent of empowering the court or the parties to eliminate a trust without a proceeding to which the trustees are parties. Its words are, the court has jurisdiction "to authorize the persons named as executors in an instrument purporting to be the last will of a person deceased, or the administrators with such will annexed, to adjust by arbitration or compromise any controversy between the persons who claim as devisees or legatees under such will and the persons entitled to the estate of the deceased under the statutes regulating the descent and distribution of intestate estates, to which arbitration or compromise the persons named as executors, or the administrators with the will annexed, as the case may be, those claiming as devisees or legatees whose interests will in the opinion of the court be affected by the proposed arbitration or compromise, and those claiming the estate as intestate, shall be parties."

It is manifest, from this analysis of the nature of an agreement for compromise and of the function of the court respecting it, that everybody who by the will is vested with a title to property which is to be affected by the agreement is a necessary party to any agreement to be approved by the court.

The will in the case at bar contains direct gifts of real estate as well as of personal property to the trustees. When the will is established, the legal title vests in them. The legal title to the real estate will vest in them by direct operation of the will. This inevitable effect of succession of legal title cannot be eliminated

by contract between the *cestuis que trust* and strangers, even though the strangers be the heirs at law of the testator. The *cestuis que trust* can make such contracts relating to their beneficial interest as may be permitted by the law. But they cannot without the assent of the trustees exclude them from being repositories of the legal title which is cast upon them by the will. No contract which shall require a transfer of that title can be effectual unless the persons who hold it are parties to that agreement. They are necessary parties to such a contract. The statute by express terms requires that the executor or administrator shall be a party to the contract. That is essential in order that he may be required to administer the estate according to the agreement rather than according to the will, which otherwise he would be obliged to follow. Either the trustees named in the will or those appointed by the court in their stead must make conveyance of the title vested in trustees under the will in question, in order that the terms of the proposed agreement may be carried out. The transfer of the title is an interest of the trustees in the subject matter of the compromise which will be affected.

The authorization contained in R. L. c. 148, § 16, that the court may appoint some person to represent any bequests for charitable purposes "if no trustees have been appointed in such will," is an implication that if trustees have been so appointed they are necessary parties. A trust not incapable of execution and not accomplished cannot be extinguished by mere agreement of parties. *Young* v. *Snow*, 167 Mass. 287. It was plainly intimated, if not expressly decided, in *Parker* v. *New England Trust Co.* 215 Mass. 226, that a trustee who is to be eliminated is a necessary party to such an agreement.

It is well known that the character, integrity, habits of thought and methods of business of the persons named as trustees often are potent factors with testators in determining the nature of trusts established by wills. This circumstance is entitled to consideration in deciding whether the Legislature intended to empower the other parties in interest by agreement to eliminate the trustees named by the testator without their becoming parties.

While there are cases holding that a trustee in some instances is not a person aggrieved by decrees as to the disposition of trust funds, *Nesbit* v. *Cande*, 206 Mass. 437, *Wiggin* v. *Swett*, 6 Met.

194, 197, *Bryant* v. *Thompson*, 128 N. Y. 426, there are other cases where the trustee is held to have such an interest respecting a trust fund that he may be a person aggrieved within R. L. c. 162, § 9. *Ripley* v. *Brown*, 218 Mass. 33, and cases collected. The legal interest of the one having title as trustee has been held to be enough to entitle him to appeal. *Northampton* v. *Smith*, 11 Met. 390, 393. The principle of *Sears* v. *Choate*, 146 Mass. 395, to the effect that a trust whose objects have been accomplished, where the interests under it have all vested and where all parties beneficially interested desire its termination, may be ended by decree of the court, does not aid the petitioners. Such a trust hardly could be terminated by a proceeding to which the trustees were not parties.

If it be conceded that the right of the trustees to compensation for their services does not constitute an interest in them in the sense of the statute, so as to entitle them to a standing under *Ensign* v. *Faxon*, 224 Mass. 145, and *Slater* v. *Hurlbut*, 146 Mass. 308, that does not prevent them from being necessary parties.

The conclusion here reached rests upon the simple proposition that no agreement as to the legal title to real or personal estate can be complete and self effectuating unless the person who holds that title is a party to it.

In accordance with the terms of the report, let the entry be, petition dismissed without costs and without prejudice.

So ordered.

SOLOMON ARAFE *vs.* J. MURRAY HOWE & another, trustees.

Suffolk. March 21, 1917. July 12, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Landlord and Tenant. Contract, Reformation. *Equity Jurisdiction,* To reform contract. *Damages,* In contract. *Equity Pleading and Practice,* Decree.

In a suit in equity by a lessee to reform a lease to him of the basement of a business building and for an abatement of rent, the trial judge found that "the whole basement under the building leased to the plaintiff includes the space under the sidewalk and outside the vertical plane of the walls of the building." There was nothing to show that the portion of the basement under the side-

walk was not used in connection with the basement as a whole. Apparently it was constructed originally for such use and was not accessible to any one except the plaintiff. The plaintiff and the defendant both had acted in accordance with an understanding that the lease covered the whole basement, including the part under the sidewalk. *Held*, that the finding of the judge was warranted.

Where the parties to a lease have put upon it a certain construction as to the extent of the premises covered by it, which is not contrary to its terms and is not forbidden by any rule of law, both parties will be bound by such construction.

Where a lease of a basement of a business building provided that the lessors might "introduce additional machinery, pipes, wires or fixtures, if they should elect so to do," this was *held* to authorize the placing by the lessor of steam or water pipes in the basement during the term of the lease.

The lessor of a basement in a business building, finding it necessary, in order to make alterations in a store above, to erect certain posts and stringers in the basement, made an agreement in writing with the lessee of the basement that the lessor should be permitted to erect the posts and stringers as shown on a certain plan attached to the agreement and that the lessee should have a yearly reduction of $500 in the rent paid by him. This placing of the posts and stringers in accordance with the contract and the plan necessitated the closing up of a window in the toilet room in the basement. *Held*, that the closing up of the window in the toilet room gave the lessee no right to relief in equity by damages or otherwise, it having been paid for by the reduction of rent already made.

In the same suit in equity brought by the lessee against his lessor it was *held* that the plaintiff was entitled to no relief or damages for any interference with or impairment of the ventilation of the toilet room caused by the closing up of the window.

In the same suit it was *held* that the plaintiff was entitled to no damages by reason of the impairment of the ventilation and light of the basement caused by the lessor placing in the basement pipes which he had a right to place there under the terms of the lease, there being no evidence to show that the lessor in exercising his right to place the pipes there did not act reasonably and in good faith.

In the same suit it was *held* that this court could not say that a finding of the trial judge was not warranted to the effect that "the plaintiff was not at fault for refusing to permit attempts at repairing injury not explained to him."

In the same suit the trial judge found that the structure in the basement under the sidewalk was not built by either the plaintiff or the defendant, and it appeared that the structure was used by the city of Boston in connection with its high pressure water system, but the evidence failed to show who placed it there, and it was *held*, that there was no evidence to show a taking by the city by right of eminent domain and consequently that the plaintiff was not entitled to a suspension or abatement of "a just proportion of the rent" under a clause of the lease relating to a taking by right of eminent domain.

In the same suit the trial judge made a finding that the plaintiff because of the presence of the structure was entitled to a reduction of rent. The ground on which the judge made this finding did not appear in the record. The judge assessed the damages at $200 a year and ordered a final decree by which the annual rent reserved in the lease should be reduced by that amount each year during the term of the lease. *Held*, that the defendant would not be liable in damages unless the structure under the sidewalk was erected and maintained upon the leased premises by his authority or consent express or implied.

It *also was held* that, in any event, the assessment of damages was erroneous, as the judge had no power to change the contract between the parties, and, if the plaintiff should be entitled to damages, the total amount must be assessed in one sum which the defendants should be ordered to pay to the plaintiff.

In the suit above described it was *ordered* that the decree should be reversed and that the case should stand for hearing upon the question, whether the structure in the basement under the sidewalk was placed there and afterwards maintained by license or authority of the defendants, and that, if it should be found that it was, the damages sustained by the plaintiff by reason thereof should be determined.

BILL IN EQUITY, filed in the Superior Court on October 4, 1915, by the lessee of the basement of the building numbered from 83 to 87, inclusive, on Summer Street in Boston, against the Trustees of the Kingston Trust, under a deed of trust dated June 10, 1913, praying (1) that the defendants be enjoined from allowing certain iron pipes, alleged to have been installed by the agents of the defendants, to remain in such a position as to make it impossible to open certain windows in the basement, (2) that the defendants be ordered to remove such iron pipes, (3) that the lease from the defendants to the plaintiff, dated August 5, 1914, be reformed and that a portion of the rent fixed by that indenture be abated because of the taking on the northerly side of the premises and (4) that the plaintiff's damages, which were suffered by reason of the taking of windows in the basement and by reason of the placing of the iron pipes, be assessed.

The case was heard by *Wait*, J., the evidence being taken by a commissioner appointed under Equity Rule 35. The judge made the following memorandum of decision:

"This cause came on to be heard and was argued by counsel. On consideration thereof I find and rule that 'the whole basement under the building' leased to the plaintiff includes the space under the sidewalk and outside the vertical plane of the walls of the building, occupied by the plaintiff.

"The presence in said space of the structure placed there in October of 1914 is a deprivation of space for which the defendants are liable for a reduction of rent while it is maintained.

"The plaintiff was not in fault for refusing to permit attempts at repairing injury not explained to him; he has been damaged by the action of the defendants in interfering with the closing and opening of windows; by the blocking up of the window in

the toilet room, and by the interference with the ventilation of the toilet room. It is difficult to express this damage in dollars, but I fix it at $200 per year.

"Let a decree be prepared accordingly."

The following additional finding was indorsed on the memorandum:

"Filed also as a finding of facts. The structure referred to of October 1914 was not placed by either the plaintiff or the defendants. The damages are estimated to cover both the deprivation and the other damage referred to."

Later by order of the judge a final decree was entered in accordance with the memorandum of decision. By such decree it was ordered "that the lease of the whole of the basement under the building situated on the corner of Summer and Kingston Streets and numbered 83–87 Summer Street in Boston in the county of Suffolk, made by the defendants to the plaintiff by an indenture dated August 5, 1914, as modified by the written agreement dated March 2, 1915, . . . be and the same hereby is modified so that the rent reserved in said lease shall be reduced $200 per year during the term to which said lease as modified in said agreement of March 2, 1915, entitles him, to be paid by equal monthly payments in advance on the first day of each and every month for the month beginning with that day, and that judgment may be entered against the defendants in favor of the plaintiff for the sum of $515.88, overpaid from November 1, 1914, to and including February 1, 1917, together with $26.75 costs of this action, as taxed by the clerk."

The defendants appealed.

James J. McCarthy, (*R. M. Bowen* with him,) for the defendants.

E. R. Anderson, (*H. Guild* with him,) for the plaintiff.

CROSBY, J. The plaintiff is the lessee named in a certain lease given to him by the defendants of "The whole of the basement under the building situated on the corner of Summer and Kingston streets in said Boston . . . " with certain exceptions not material to the issues involved.

The premises were to be used by the plaintiff as a bowling alley and pool room and the lease is for the term of five years from October 1, 1914. This suit is brought for the re-formation of the lease and for an abatement and reduction of the rent reserved

on account of the taking of a part of the premises leased and for other acts done or permitted by the defendants.

1. The judge of the Superior Court before whom the case was heard found that "the whole basement under the building leased to the plaintiff includes the space under the sidewalk and outside the vertical plane of the walls of the building occupied by the plaintiff." This finding was warranted. There was nothing to show that that portion of the basement under the sidewalk was not be to used in connection with the basement as a whole. Apparently it was originally constructed for such use, and is not now accessible to anyone except the plaintiff.

The plaintiff and the defendants understood that the lease covered the whole basement including that part under the sidewalk and acted in accordance with such understanding. Such was the manifest intention of the parties, and the construction which they put upon the lease should be followed unless forbidden by some positive rule of law. In the present case we cannot say that the construction adopted and acted upon violates any rule of law. *Dakin* v. *Savage*, 172 Mass. 23. *Epstein* v. *Dunbar*, 221 Mass. 579.

The course of conduct of the parties constitutes a construction of the lease which will prevent the lessee at this time from asserting a different construction. *Epstein* v. *Dunbar*, *supra*.

2. The placing of steam or water pipes in the basement during the term of the lease by the defendants was not a violation thereof but was expressly authorized thereby by the provision which authorized the defendants to "introduce additional machinery, pipes, wires or fixtures, if they should elect so to do."

3. About six months after the beginning of the term, the defendants desired to make certain alterations in the store, on the first floor of the building immediately above the basement leased to the plaintiff, which necessitated placing some posts and stringers in the basement as shown on a certain plan; and on March 2, 1915, the plaintiff and the defendants entered into an agreement in writing, in which the plaintiff agreed that the defendants should be permitted to erect the posts and stringers, as shown on the plan, which was attached to the agreement, and the plaintiff was to have a yearly reduction of rent of $500. As the placing of the posts and stringers in the basement necessitated closing up the

window in the toilet room, the plaintiff is not entitled to damages therefor, as the closing up of this window was in accordance with the contract and plan, and was one of the changes made for which he was to receive a reduction of rent.

4. As the defendants for the reason stated are not liable in damages for closing the window in the toilet room, the plaintiff is not entitled to recover for any interference with or impairment of the ventilation of that room caused by closing the window.

As the placing of pipes in the basement by the lessors was authorized by the express provisions of the lease, as already pointed out, no damages can be recovered therefor, and although the evidence shows that the pipes prevented some of the windows in the basement from being opened and others could only be opened to a very limited extent, and that thereby the ventilation and light of the basement is impaired, still for such interference, the plaintiff is not entitled to damages as there is no evidence to show that the defendants in exercising their right to introduce the pipes did not act reasonably and in good faith.

5. We cannot say that the finding of the trial judge was not warranted that "The plaintiff was not in fault for refusing to permit attempts at repairing injury not explained to him."

6. The lessee contends that a structure built in the basement under the sidewalk in October, 1914, and which is used by the city of Boston in connection with its high pressure water system, was a taking of a part of the leased premises by right of eminent domain. This contention cannot be sustained. There is no evidence to show such a taking or any taking by the city; all that appears is that the structure is used by the city of Boston. The evidence fails to show who placed it there, although it is found by the judge that it was not built by either the plaintiff or the defendants.

That part of the proviso in the lease which entitles the lessee to a suspension or abatement of "a just proportion of the rent" has no application to the facts as shown by the evidence.

The judge made the following finding, "The presence in said space of the structure placed there in October of 1914, is a deprivation of space for which the defendants are liable for a reduction of rent while it is maintained."

As there was no evidence to show that there had been a taking

of any part of the leased premises by right of eminent domain or that the structure had been erected under such a right, the defendants are not liable for a reduction of rent, nor would they be liable if it was placed there by a stranger, nor would they be so liable unless it was erected and maintained upon the leased premises by their authority or consent express or implied.

The ground upon which the judge made the finding that the plaintiff because of the presence of the structure was entitled to a reduction of rent does not appear in the record.

7. The damages assessed by the presiding judge were fixed at $200 a year, and the final decree provided that the annual rent reserved in the lease should be reduced by that amount each year during the term thereof. This was erroneous, as the judge did not have power so to change the contract between the parties. If the plaintiff shall be found to be entitled to damages, the final decree should state the total damages assessed in one sum and direct that that amount be paid by the defendants to the plaintiff.

The decree must be reversed; the case is to stand for hearing upon the question whether the structure in the basement under the sidewalk was placed there and afterwards maintained by license or authority of the defendants, and, if so, the damages sustained by the plaintiff on account thereof are to be determined.

So ordered.

Otis Brown *vs.* Inhabitants of Peabody.

Essex. March 16, 1917. — July 17, 1917.

Present: Rugg, C. J., De Courcy, Crosby, Pierce, & Carroll, JJ.

Equity Pleading and Practice, Master's report. *Deed. Way*, Private. *Municipal Corporations. Sewer. Equity Jurisdiction*, To enjoin continuing trespass, Damages.

Where a suit in equity is reserved and reported by the trial judge for determination by this court upon a master's report, to which no exceptions were taken, the parties are deemed to have accepted the master's report and are concluded by his findings of fact, and the only question to determine is what decree is to be entered upon the pleadings and the facts as found by the master.

In determining in a suit in equity the question of fact, whether the owner of a

tract of land, who conveyed it to different persons by a number of deeds made between the years 1825 and 1850 describing the land as abutting on certain private streets, intended to convey to the grantees of the several lots any right in the fee of such private streets, it is proper to consider the state of the law in this Commonwealth at the time the deeds were made.

Where a master in a suit in equity, whose findings had been accepted by the parties, in passing upon the question of fact stated above found "that the original grantor, J P, did not intend to part with the fee in the two streets in question" and further found that "the plaintiff has whatever title J P retained in these streets," it was *held* that the master was plainly right in finding that the title to the fee in the two streets in question was in the plaintiff.

In the same suit it was found by the master that the two streets never had been laid out as public ways and never had become such ways by dedication or prescription and that the use of them by the public was permissive, and it appeared that the town in which they lay, against which the suit was brought, with knowledge of the plaintiff's claim of ownership and against his protest had constructed sewers through these streets without authority to do so. *Held*, that the plaintiff was not required to accept indemnity in money damages and was entitled to relief by injunction.

In the case above described it was found by the master that the plaintiff was damaged in the sum of $250 by reason of the acts of the defendant, which sum included all past and future damages that might accrue to him, and it was *held*, that the maintenance of the sewers in the plaintiff's land was a substantial continuing trespass, for which an assessment of past and future damages could not be made rightfully without the plaintiff's consent.

In the same suit it appeared that the abuttors on the two streets generally had made connections with the sewers constructed by the defendant and that sewer assessments had been laid by the defendant and had been paid by the abuttors, and it was *held*, that, in view of these facts, the defendant should be allowed a reasonable time within which it might acquire by proper legal proceedings the right to lay and maintain its sewers in the two private streets, if it should choose to do so. Accordingly a decree was entered awarding an injunction and commanding the defendant to remove the sewers within five months unless previously the defendant should have acquired the legal right to their maintenance, the court in the meantime retaining the bill for the assessment of damages already suffered.

BILL IN EQUITY, filed in the Superior Court on January 1, 1914, to enjoin the town of Peabody from trespassing on the plaintiff's land by unlawfully maintaining sewers in Munroe Street and Hardy Street in that town, private ways alleged to be owned in fee by the plaintiff, praying also for an assessment of damages and for further relief.

The case was referred to a master, to whose report no exceptions were filed. Later the case came on to be heard upon the bill and answer and the master's report before *Stevens*, J., who reserved and reported it for determination by this court.

J. J. Sheehan, for the defendant.

S. H. Donnell, for the plaintiff.

CROSBY, J. This is a bill in equity brought to enjoin the defendants from maintaining in and under Munroe and Hardy streets, in Peabody, certain main drains and common sewers laid by the defendants; and for an assessment of damages caused to the plaintiff thereby.

It is the contention of the plaintiff that he is the owner of the fee in the above named streets, that they are private ways and are subject only to the rights of certain owners of lands abutting upon the streets to pass over them.

The defendants deny that the plaintiff is the owner of the fee in the streets, and contend that they are public ways by prescription.

1. The case was referred to a master to whose findings of fact no exceptions were taken. The judge of the Superior Court who heard the case reserved it for our consideration upon the bill, answer and master's report, with leave to exhibit at the arguments before the full court the plan referred to in the master's report.

Under these circumstances, the parties are deemed to have accepted the master's report, and are concluded by his findings of fact. *Hillier* v. *Farrell*, 185 Mass. 434. *Lipsky* v. *Heller*, 199 Mass. 310. The question is to determine what decree is to be entered upon the facts as found by the master.

2. The earliest deed in evidence to prove the plaintiff's title was from the town of Danvers to Joseph Poor, Jr., and Jesse Parker, and is dated September 4, 1809. Soon afterwards, by deed dated December 13, 1809, Parker conveyed his interest in the land described in the first deed to Poor. From 1809 to the time of his death in 1850, Poor cut up the land into building lots and conveyed them to different persons by sixteen deeds, all of which were duly recorded and all but one were recorded before the year 1850.

The first of these deeds, in which reference is made to a right of way, was given to William Bushby and is dated April 13, 1825. In this deed as well as in all the others except one, reference is made to one or both of the ways in question by different forms of expression. In some the land conveyed is bounded on a way, in others the lines run to the way, and in still others the land is conveyed with a right of passage over the way; in one the land is

conveyed "with the privilege of using all the ways I have laid out in common with me and others for the purpose of passing to and from said premises with teams and otherwise on all occasions."

When these ways were established by Joseph Poor, Jr., and before 1851, it was well settled in this Commonwealth that a deed of land abutting upon a way did not convey a fee in any part of the way. *Tyler* v. *Hammond*, 11 Pick. 193, 213. *O'Linda* v. *Lothrop*, 21 Pick. 292, 295.

The rule as stated in the above cases prevailed in 1851, but it has been somewhat modified by later decisions of this court. It was held in *Crocker* v. *Cotting*, 166 Mass. 183, and *Frost* v. *Jacobs*, 204 Mass. 1, that where a way is described as a boundary in a conveyance of land, it is presumed to mean the middle of the way if the way belongs to the grantor; but as was said in *Crocker* v. *Cotting*, *supra*, "it is not an absolute rule of law irrespective of manifest intention, like the rule in Shelley's case, but is merely a principle of interpretation adopted for the purpose of finding out the true meaning of the words used."

This presumption of fact however may be overcome if the language used and the other evidence indicate a different intention. It is not to control against a manifest purpose not to convey any right in the fee.

In determining whether Joseph Poor, Jr., the original grantor of the lots, intended to convey to any of his grantees a fee in the ways in question, the state of the law when the deeds were given may be considered in determining the meaning and purpose of the words used. *Staigg* v. *Atkinson*, 144 Mass. 564, 569. *Hamlen* v. *Keith*, 171 Mass. 77, 79.

The master finds that the title to the streets subject to the easement in the abutters is in the plaintiff. He also specifically finds "that the original grantor, Joseph Poor, did not intend to part with the fee in the two streets in question." He further finds that "the plaintiff has whatever title Joseph Poor retained in these streets, he [the plaintiff] having received the same by various mesne conveyances and assignments."

An examination of the above mentioned deeds given by Joseph Poor does not show that the findings were not warranted.

In view of the law as it stood when the deeds were given, and the express finding that no conveyance of the fee in the streets

was intended to be granted, the master was plainly right in his finding that the title to the fee in Munroe and Hardy streets was vested in the plaintiff.

3. The master finds that the streets have never been laid out as public ways and that they have not become such ways, either by dedication or by prescription. The report recites that there was evidence that for nearly forty years "Private way" signs were maintained uninterruptedly at the end of each street, and were not only known to be there by the town but sign painters employed by the town have repainted them and put them up again at least once in recent years.

He further finds, that no repairs of consequence have been made by the town upon either Munroe Street or Hardy Street but that there was abundant evidence to show that such repairs were made by the abuttors; and also, that the use by the public was permissive.

As the evidence is not reported, these findings must stand. *Jennings* v. *Tisbury*, 5 Gray, 73. *Durgin* v. *Lowell*, 3 Allen, 398. *Moffatt* v. *Kenny*, 174 Mass. 311. *Weldon* v. *Prescott*, 187 Mass. 415.

4. At the time it was decided by the defendant's officers to lay the sewers, the plaintiff went to the sewer commissioners and asked them what they intended to do on Hardy and Munroe streets, and was told by one of the commissioners that the town was going to lay sewers there. The plaintiff told the commissioner that he protested against such action, that he owned the land included within the streets, and that the town had no right to construct the sewers. The commissioner replied in substance that the town could do whatever was necessary to lay the sewers and that the plaintiff could resort to the courts if he had any rights in the land in the streets. Thereafter, in the year 1906, the sewers were laid.

It thus appears that the defendant, with full knowledge of the plaintiff's claim to the ownership of the fee in the streets and against his protest, committed the trespasses complained of and constructed the sewers for their own benefit and convenience.

Under these circumstances, the plaintiff, against his consent, is not to be deprived of his property and is not required to accept indemnity in money damages, but is to be protected in the enjoyment of his property by injunctive relief. *Downey* v. *H. P. Hood & Sons*, 203 Mass. 4, 12. *Perley* v. *Cambridge*, 220 Mass. 507.

The master found that the plaintiff was damaged in the sum of $250 by reason of the acts of the defendant, which sum included all past and future damages that might accrue to him. The maintenance of the sewers in the plaintiff's land is a substantial continuing trespass, and an assessment which included past and future damages could not, without the consent of the parties, properly be made. *Aldworth* v. *Lynn*, 153 Mass. 53, 56.

It appears that the abuttors on the streets (some of whom maintain establishments employing a great many persons) generally have connected with the sewers so laid by the defendant, and that sewer assessments have been levied by the town and paid by the abuttors. In view of these facts, the defendant should be allowed a reasonable time within which it may by proper legal proceedings acquire the right to lay and maintain the sewers in Munroe and Hardy streets, if it shall elect to do so.

Accordingly, a decree is to be entered granting an injunction and commanding the removal of the sewers within five months from the date of the rescript, unless previously the defendant shall have acquired the legal right for their maintenance, while retaining the bill for the assessment of damages already suffered.

Ordered accordingly.

FRANK MAGGELET'S CASE.

Suffolk. March 16, 1917. — July 24, 1917.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Personal injury, Procedure. *Practice, Civil*, Vacating decree. *Words*, "Personal injury."

Neurosis of the nerves supplying certain muscles, resulting from a posture which causes a cigar-maker when at his work to bend with shoulders forward so as to induce "pressure on the brachial plexus," is not a "personal injury" within the meaning of St. 1911, c. 751, Part II, § 1, for which such employee may be awarded compensation under the workmen's compensation act.

Upon an appeal from a decision of the Industrial Accident Board in a claim under the workmen's compensation act the Superior Court may vacate a decree which was made by that court without notice of a pending petition by the insurer for a rehearing before the Industrial Accident Board.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to Frank Maggelet, who was employed as a cigar-maker in the cigar factory of Breslin and Campbell, incorporated, in Boston.

The case was heard by *Fox*, J., who on November 11, 1916, made a decree awarding the employee the sum of $321.43. On November 14, 1916, the insurer filed a motion to vacate the decree on the ground that before the decree was made the insurer had filed with the Industrial Accident Board a petition for a rehearing and reopening of the case. On November 16, 1917, *Fox*, J. made an order vacating the decree and filed the following memorandum of decision: "At the hearing of the motion to vacate the decree, the counsel for the claimant admitted that when he presented the decree to the court for allowance he knew that the insurer had filed with the board a petition for rehearing, and did not inform the court of this fact. The decree is therefore vacated on the ground that it was entered by inadvertence and under misapprehension concerning the state of the record."

On December 16, 1916, the Industrial Accident Board denied the insurer's petition for a rehearing and amended their former decision by striking out the words "and affirm and adopt the findings and decision of the committee of arbitration."

On December 18, 1916, by order of *Lawton*, J., a decree was entered reciting the amendment of the decision of the Industrial Accident Board and again ordering that the insurer should pay to the employee the sum of $321.43. The insurer appealed.

L. C. Doyle, for the insurer.

B. A. Lockhart, for the employee.

RUGG, C. J. This case comes before us on a finding and decision of the Industrial Accident Board with a report of all the material evidence. The finding is that "the employee was totally incapacitated for work by reason of a condition of occupational neurosis which arose out of and in the course of his employment."

It is undisputed that the employee was a cigar-maker by trade and had worked for the subscriber twenty-five years; and in March, 1916, he stopped work and on consulting a physician was told that he was troubled with "occupational neurosis;" and that during the preceding six months his arm had troubled him. Dr.

Joel E. Goldthwait, the impartial physician appointed by the board, testified that "he could find no evidence of disease whatever . . . . At the time he saw this man, he believed that his posture and habit of carrying himself was really the cause of his present pain in the arms; he could not say that there was anything outside the posture, peculiar to his trade, that causes him to have that pain. If this man would adopt a different posture, keep himself straight, he thinks he would recover from this trouble without much question; any occupation he might follow where he carried himself in that same position would cause the same trouble as the cigar-maker's occupation, will produce the same result; he found no evidence of the man being neurasthenic, and he does not believe that the continual rolling of cigars has caused the trouble that this man now has; he examined him for evidences of organic disease and found none; his muscles were practically all in normal tones and normal responses. . . . He has a posture which is not good and which he has had for many years; if he was standing up at his work and had this posture when he sat down, he would not be leaning on that group of nerves all the time, but because he is all the time leaning on that group of nerves, it has aggravated and brought this condition to a place where he had to quit work. If the man is handled right, he can be made splendidly well, and he thinks he can go on with that trade, but he thinks he has to be seated properly at his work." There was further medical evidence to the effect that "he is nervous and thinks about his arm and hand and makes an entirely, abnormally slight response to the request for any muscular action in that arm. He has no sign of any organic disease in arm at all and evidence of neurosis, and I think the condition is a pure neurosis that arises from his occupation;" and that "His work as cigar maker would influence the condition of neurosis to this extent: The position of cigar makers which causes them to bend forward with shoulders forward, as Dr. Goldthwaite states, would cause pressure on the brachial plexus, and make the condition worse. The employee should be able to work if he could be kept in proper position so that the pressure on the brachial plexus would not be caused by his position. . . . He deduced that the trouble was occupational neurosis from the fact that an occupational neurosis is the result of the use of certain muscles, or group of muscles, to such an extent that they cause a neurosis

of the nerves supplying these muscles. . . . It is very possible that there is a certain amount of pressure on the brachial plexus from the position cigar makers assume in their work; he traces it to the continued use of these muscles. . . . It is not peculiar to the cigar makers' trade."

There is here no foundation for a finding that the employee sustained "personal injury" which arose out of and in the course of his employment. "Personal injury" as used in the workmen's compensation act, has been held to be more comprehensive than the "personal injury by accident" of the English act. The cases which have arisen heretofore under our act have been of a different character from that here presented. In *Hurle's Case*, 217 Mass. 223, *Johnson's Case*, 217 Mass. 388, and *Doherty's Case*, 222 Mass. 98, the evidence showed that the employee was suffering from poisoning by the inhalation of gases or other noxious substances plainly connected with the performance of his work. Poisoning always has been regarded as a tortious act in the nature of a personal injury, for which damages might be recovered in an action at law if other elements of liability are present. *Thompson* v. *United Laboratories Co.* 221 Mass. 276. *Madden's Case*, 222 Mass. 487, 491. *Hurle's Case*, 217 Mass. 223, and cases collected at page 224. *Pinkley* v. *Chicago & East Illinois Railroad*, 246 Ill. 370. *Canfield* v. *Iowa Dairy Separator Co.* 172 Iowa, 164. *Wagner* v. *Jayne Chemical Co.* 147 Penn. St. 475. *Cox* v. *American Agricultural Chemical Co.* 24 R. I. 503. *Fox* v. *Peninsular White Lead & Color Works*, 84 Mich. 676, 682. In *McPhee's Case*, 222 Mass. 1, pneumonia brought on by sudden exposure during a fire was held to be a personal injury. That would be a personal injury by accident under the English act. *Coyle* v. *John Watson, Ltd.* [1915] A. C. 1. *Glasgow Coal Co. Ltd.* v. *Welsh*, [1916] 2 A. C. 1. In *Brightman's Case*, 220 Mass. 17, *Fisher's Case*, 220 Mass. 581, and *Madden's Case*, 222 Mass. 487, persons suffering from an organic infirmity of the heart were held to have sustained a personal injury when the exertion of the employment caused a lesion or further impairment of that organ destroying or affecting adversely its usefulness. These all are instances of a definite and appreciable attack upon some vital faculty or function having a specific connection with the employment. See also in this connection *Vennen* v. *New Dells Lumber Co.* 161 Wis. 370;

Plass v. *Central New England Railway*, 169 App. Div. (N. Y.) 826; *Archibald* v. *Ott*, 77 W. Va. 448. No case has gone so far as to hold that a "neurosis of the nerves" supplying certain muscles, resulting from a posture which causes the employee "to bend forward with shoulders forward" so as to induce "pressure on the brachial plexus" is a personal injury.

The words "personal injury" in their connection in this statute do not naturally lend themselves to a situation such as that here disclosed. The act relates to industrial conditions. It has to do with employment of labor. The act affords no relief against general disease. It is not a scheme for health insurance. It deals only with personal injuries following as an immediate result from the employment as its direct cause. In general it was intended as in the nature of a substitute for actions of tort for personal injuries at common law and under the employers' liability act, by employees against their employers. That is apparent from the provisions of Part I of the workmen's compensation act as well as the legislative resolves and reports preceding its enactment. But, as has been pointed out, the act goes beyond those limits and includes such diseases as fairly may be termed personal injuries. The act does not mention disease or occupational disease. See St. 1913, c. 813, § 12. It awards compensation for disease when it rightly may be described as a personal injury. A disease of mind or body which arises in the course of employment, with nothing more, is not within the act. It must come from or be an injury, although that injury need not be a single definite act but may extend over a continuous period of time. Poisoning, blindness, pneumonia, or the giving way of heart muscle, all induced by the necessary exposure or exertion of the employment, fall within well recognized classes of personal injuries. On the other hand the gradual breaking down or degeneration of tissues caused by long and laborious work is not the result of a personal injury within the meaning of the act. A person may exhaust his physical or mental energies by exacting toil, and become unfit for further service, but he is not because of this entitled to compensation, for the reason that this condition cannot fairly be described as a personal injury. The disease must be, or be traceable directly to, a personal injury peculiar to the employment. A nervous condition dependent upon poor posture of the body in our opinion

does not constitute a commonly known and well recognized personal injury consequent upon employment. It is difficult to establish and define a plain line of division between what is personal injury within the act on the one hand and simple disease on the other hand. But personal injury and disease are not synonymous. They are different in meaning. One does not include the other. They are classifications differing from each other in kind, although they may overlap in some instances.

There is not enough in this record to show that the condition of the employee is a necessary result of his work. It arose on all the evidence from a bad posture of the body while at work. But there is nothing to show that this was a necessary incident of the employment. Scarcely anything is more difficult to control or influence than the position of the body of another. Whether one shall be erect or stooping of figure, whether the carriage of the person shall be lithe or stiff, whether the chest shall be narrow or broad and the space for the lungs correspondingly cramped or enlarged, whether breathing shall be deep and full, or short and impaired, depend in large degree upon the habit, temperament and appreciation of the requisites of right living on the part of the individual. Interference on these matters by the employer might be regarded as an unwarranted impairment of personal privilege. There are few employments which, pursued without regard to the laws of health and the requirements of correct method of life, may not invite some form of disease. This record is bare of any evidence to show that it is a reasonably necessary result of the employment that those following it should have neurosis or that the inducing proximate cause of that condition is the employment.

This court has gone further than any other, so far as we are aware, in holding that poisoning, heart lesion and kindred physical ills may be found to be personal injuries under the act. The courts of other states of the Union, in construing workmen's compensation acts more or less similar to our own, have declined to follow *Hurle's Case*, 217 Mass. 223, and the principle there established, and have held that poisoning arising out of the employment through the inhalation of gases or other substance was not a personal injury under the act. *Adams* v. *Acme White Lead & Color Works*, 182 Mich. 157. *Industrial Commission of*

Ohio v. *Brown*, 92 Ohio St. 309. *Miller* v. *American Steel & Wire Co.* 90 Conn. 349. See *Liondale Bleach, Dye & Paint Works* v. *Riker*, 56 Vroom, 426. Nevertheless we remain content with our decisions in this particular. But the doctrine has not been established by these decisions that every disease caught by an employee in the course of his employment is a personal injury under the act. See in this connection *Turvey* v. *Brinton's, Ltd.* [1904] 1 K. B. 328, 338; *Brinton's, Ltd.* v. *Turvey*, [1905] A. C. 230, 238; *Eke* v. *Hart-Dyke*, [1910] 2 K. B. 677, 682.

It seems clear for these reasons that the present case cannot rightly be termed a personal injury within the meaning of those words in the act.

The case is before us properly. The entry of the first decree was manifestly caused by the failure of the employee to state the case truly and fully to the court, and therefore was entered at least through mistake and accident. It was within the power of the court to correct such an error. *Karrick* v. *Wetmore*, 210 Mass. 578. *Hathaway* v. *Congregation Ohab Shalom*, 216 Mass. 539. The only decree from which an appeal could be taken properly was the one of December 19, 1916.

It follows that the decree must be reversed and a new decree entered to the effect that the insurer is under no liability.

So ordered.

CHARLES S. ASHLEY *vs.* THREE JUSTICES OF THE SUPERIOR COURT & intervenors.

Bristol. June 18, 1917. — July 30, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Corrupt Practices Act. Elections. Constitutional Law. Prohibition, Writ of. Words, "Shall," "Property," "Suits between two or more persons."

Under St. 1914, c. 783, § 10, an allegation, in a petition charging the respondent with having violated provisions of the corrupt practices act in connection with his election as the mayor of a certain city, that the petitioners are "inhabitants, taxpayers, and qualified voters in the city" in question, is a sufficient averment that the petitioners had a right to vote for mayor at the election in question, which was less than two months before the filing of the petition. And, if such allegation were not sufficient, it could be amended, so that the validity of the proceeding would not be impaired.

In the provision of St. 1914, c. 783, § 10, (*c*) that, "Election petitions . . . shall be heard and determined by three justices of the Superior Court who shall each year, immediately following the annual State election, be assigned by the Chief Justice of said court for the hearing and determination of all matters arising under election petitions during the ensuing year," the word "shall" has no compulsory significance in relation to fixing the time when the assignment of the three judges shall be made, and such an assignment made by the Chief Justice of the Superior Court nearly three months after the last annual State election on the day following the granting by a judge of the Superior Court of an order to the effect that there is reasonable cause to believe that a corrupt practice has been committed by the respondent named in an election petition under the statute, is a valid assignment of the three judges who are to hear and determine all matters arising under election petitions during the year, including the petition already filed.

By an assignment by the Chief Justice of the Superior Court under authority of the statute named above of three judges of that court to hear election cases during the year no new tribunal is created, and the statute does not violate c. 2, § 1, art. 9 of the Constitution, which provides that "All judicial officers . . . shall be nominated and appointed by the Governor, by and with the advice and consent of the Council."

For the reason named above it did not become necessary for this court in the present case to consider, *whether* the subject of elections is of a nature so political that the Legislature is unlimited in its power to establish tribunals to deal with questions relating to elections to public office and to define the jurisdiction of such tribunals.

Article 15 of the Declaration of Rights, which provides that "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury," does not apply to an election petition under the statute named above; because the right to hold an office to which one has been elected is not "property" within the meaning of the word as used in the Declaration of Rights and a proceeding upon an election petition is not a "suit between two or more persons" in the sense in which those words there are used.

The hearing of an election petition under the corrupt practices act is a civil proceeding in the nature of a quo warranto, and is not a criminal prosecution.

The provisions of the corrupt practices act contained in St. 1913, c. 835, § 497, as amended by St. 1914, c. 783, § 12, that "Whoever is found by final judgment upon an election petition . . . to have committed a corrupt practice, and shall, in accordance with such finding forfeit the office to which he has been elected, or whoever is convicted in a criminal proceeding of violating any provision of law relating to corrupt practices in elections shall be disqualified as a voter for a period of three years following the date of his conviction, and shall be deemed ineligible to hold public office for the said period," considered in connection with the Fortieth Amendment to the Constitution, which added to the classes of persons from whom the right to vote is withheld, who theretofore were "paupers and persons under guardianship," "persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections," do not give the respondent in an election petition a constitutional right to a trial by jury thereon.

The provisions of the corrupt practices act above described impose no unconstitutional limitations upon the right to vote or the right to hold office.

The "full power and authority" given to the General Court by c. 1, § 1, art. 3 of the Constitution "to erect and constitute judicatories and courts of record, or other courts," includes by necessary implication the power to fix the territorial limits within which such courts shall exercise jurisdiction and the places at which they shall be held. The provision of the corrupt practices act that election petitions shall be entered in the Superior Court in Suffolk County is within this power, and the respondent's right under art. 11 of the Declaration of Rights "to obtain right and justice freely" is not impaired thereby.

There is nothing in the corrupt practices act in conflict with the provision of art. 9 of the Declaration of Rights that "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

There is nothing in the corrupt practices act that deprives the respondent in an election petition of the equal protection of the laws.

The provision of the corrupt practices act contained in St. 1913, c. 835, § 371, as amended by St. 1914, c. 783, § 11, excepting from its operation the elections of town officers in towns of less than ten thousand inhabitants, does not impair the constitutional validity of the act.

There is nothing in the corrupt practices act in derogation of the constitutional powers of the Supreme Judicial Court.

There is nothing in the corrupt practices act in conflict with any provision of the Constitution of the United States.

The provision in regard to trial by jury in the Seventh Amendment to the Constitution of the United States relates only to the courts of the United States.

Trial by jury is not essential to the due process of law secured by the Fourteenth Amendment to the Constitution of the United States.

Neither the right to hold an elective public office nor the right to vote is a property right within the meaning of the Fourteenth Amendment to the Constitution of the United States.

The portion of the corrupt practices act contained in St. 1914, c. 783, § 10, which in *Dinan* v. *Swig*, 223 Mass. 516, was held to be unconstitutional and void as in violation of the provisions of the Constitution, which make each branch of the General Court the final judge of the returns, elections and qualifications of its own members, is distinct and separate from the rest of the act and does not affect the validity of the other parts.

A writ of prohibition will not be issued to correct errors or irregularities of a tribunal that is acting within its jurisdiction, and can be invoked only to prevent such tribunal from exercising a jurisdiction that it does not possess.

The respondent named in an election petition brought under St. 1914, c. 783, § 10, charging him with having violated the provisions of the corrupt practices act in connection with his election as the mayor of a city, appeared specially and pleaded specially that he could not be held to answer the petition because the subpoena addressed to him had been made returnable in fifteen days instead of fourteen days after the filing of the petition. A few days later, without waiting for the Superior Court to pass upon his plea, he brought a petition for a writ of prohibition against the three judges of the Superior Court assigned to hear election petitions. *Held*, that the matter set up in the special plea in regard to the return day of the subpoena was within the jurisdiction of the Superior Court, and was not open to the petitioner upon his petition for a writ of prohibition.

PETITION, filed on February 16, 1917, and allowed to be filed in its amended form on March 20, 1917, by Charles S. Ashley, who was elected mayor of New Bedford on December 5, 1916, against three justices of the Superior Court, for a writ of prohibition prohibiting the respondents from proceeding to hear and determine an election petition of Edward R. Hathaway and four others, charging the present petitioner with having violated the corrupt practices act and seeking to have his election as mayor of New Bedford declared void, alleging "that on January 25 last Edward R. Hathaway and four others of said New Bedford made written application to a justice of the Superior Court sitting in Suffolk County for leave to file an election petition and obtained an order thereon giving such leave, and thereafter on January 26, 1917, filed in the Superior Court for the County of Suffolk an election petition asking to have the aforesaid election of this petitioner as mayor of New Bedford declared void; that neither the said application, nor the said order, nor the said petition, alleged that the said Hathaway and four others, or any of them, had the right to vote for this petitioner, or had the right to vote at the election in which this petitioner was chosen mayor, and no evidence that they or any of them had such right was introduced at the hearing on said application; that the subpoena issued on said election petition was not returnable fourteen days after the date of the filing of the petition as required by law; that the said writ of subpoena did not bear test of the first justice of the court to which it was returnable; that at the time said election petition was filed no court was legally constituted for the trial of said petition; that at the time said petition was filed the respondents had not been and were not legally assigned for the hearing and determination of election petitions, and had not then been and are not now legally assigned for the hearing and determination of the aforesaid election petition; that the respondents, claiming to be legally assigned for the hearing and determination of election petitions, are intending and proceeding to hear and determine the said election petition brought against this petitioner; that the statute under which the respondents are acting, and the statutes creating, defining, penalizing and punishing corrupt practices at elections are unconstitutional and violate the Constitution of the Commonwealth of Massachusetts; that

the statute under which the respondents are acting and the other statutes aforesaid are unconstitutional and in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, in that they abridge the privileges and immunities of citizens of the United States, in that they deprive persons of life, liberty and property without due process of law, and in that they deny persons within their jurisdiction equal protection of the laws; and that the respondents have no jurisdiction to hear and determine said election petition."

The respondents filed an answer. By orders of the court Edward R. Hathaway and the Attorney General were permitted to intervene as parties respondent.

The special appearance of the present petitioner in the Superior Court for the purpose of moving to dismiss the election petition against him, which is mentioned in the opinion, was filed on February 10, 1917, and was as follows: "And now, without waiving any rights, and without submitting himself to the jurisdiction of the court, the respondent, appearing specially for the sole purpose of objecting to the jurisdiction, says that the subpoena in this case was not made returnable fourteen days after the date on which the petition was filed, and that no proper subpoena has been duly served upon the respondent. Wherefore, he prays that the petition be dismissed."

The case came on to be heard before *Braley*, J., upon the amended petition, the answer to the original petition and the answer to the amended petition. It was admitted that all the allegations of fact in the amended petition and the answers were true, and the single justice found them to be true. The justice reported the case for determination by the full court, with the stipulation that the petition was not to be denied on the ground of discretion.

The case was argued at a special sitting of this court on June 18, 1917.

J. W. Cummings & C. R. Cummings, for the petitioner.

H. E. Woodard, for Edward R. Hathaway.

C. W. Mulcahy, Assistant Attorney General, for the Attorney General, filed a brief.

RUGG, C. J. This is a petition for a writ of prohibition. The petitioner is the respondent in an election petition filed under the

corrupt practices act, St. 1913, c. 835, as amended by St. 1914, c. 783. That election petition charged the respondent therein, the present petitioner, who hereafter will be called the petitioner, with having violated provisions of the corrupt practices act in connection with his election in December, 1916, as mayor of New Bedford. The respondents are three judges of the Superior Court who have been assigned to hear such election petitions. The grounds alleged for the issuance of the writ of prohibition in the petition at bar, succinctly stated, are, (1) that the election petition is fatally defective in jurisdictional allegations not susceptible of being cured by amendment, (2) that the respondents have no jurisdiction to hear the election petition because not legally assigned therefor in accordance with the statute, (3) that the statute under which the election petition is brought is unconstitutional in several respects, (4) that no legal subpoena issued to summon the respondent into court in that, while the statute required that the subpoena "be returnable fourteen days after the date on which the petition is filed," it was in fact made returnable fifteen days thereafter.

In their answer the respondents admit that the petitioner was declared elected and was inaugurated mayor of New Bedford, and aver that they were assigned in accordance with the statutes to hear election petitions, that they were at the time of the filing of the present petition intending and proceeding to hear the election petition brought against the present petitioner and that the papers on file show that the subpoena on the election petition was returnable fifteen days after the filing of the petition, and that the petitioner as respondent therein appeared specially and filed a motion to dismiss the election petition on the ground that the subpoena was not issued according to the statute and he had not been rightly summoned, and that no action has been taken by them upon this motion to dismiss, only seven days having elapsed between its filing and the bringing of the present petition, whereupon they immediately directed all proceedings in the election petition case to be suspended until the further order of the Supreme Judicial Court on the present petition.

The first of the petitioners in the election petition and the Attorney General have been allowed to intervene. The case was reserved upon the petition and answer for the determination of the full court.

These several grounds urged in support of the issuance of prohibition will be examined in the order stated above.

1. The first is the fatally defective nature of the election petition.

That petition alleges that the petitioners therein named are "inhabitants, taxpayers, and qualified voters in the city of New Bedford." This is a sufficient averment that the petitioners had a right to vote for mayor at the election in question in a proceeding of this sort, where the petition, by St. 1914, c. 783, § 10 (*b*), must be filed within two months after the date of the election to which it relates, in view of other requirements of law as to registration of voters and the well known customs of registrars. But if the allegations were not sufficient, they might be corrected by amendment. See *Tucker* v. *Fisk*, 154 Mass. 574, 578; *Dartmouth* v. *County Commissioners*, 153 Mass. 12; *Crafts* v. *Sikes*, 4 Gray, 194. The decisions relied on by the petitioner need not be reviewed. They are by courts of other jurisdictions, where doubtless the policy of the law is more insistent upon niceties of pleading than it is in this Commonwealth.

2. The second ground urged by the petitioner is that the respondents have not been legally assigned as the three judges to hear election petitions in accordance with the statute, and hence are without jurisdiction in the premises.

The words of St. 1914, c. 783, § 10 (*c*) are that "Election petitions . . . shall be heard and determined by three justices of the Superior Court who shall each year immediately following the annual State election, be assigned by the Chief Justice of said court for the hearing and determination of all matters arising under election petitions during the ensuing year." The annual State election in 1916 was held on November 7. The three judges were not assigned by the Chief Justice of the Superior Court until January 27, 1917, which was the day following the granting of the order by the Superior Court judge to the effect that there was reasonable cause to believe that a corrupt practice had been committed by the petitioner. It does not appear that there had been any occasion for the assignment of the three judges earlier than this date, or that there had been any suggestion upon the records of the court that any corrupt practice had been committed in the Commonwealth. The word "shall" as used in this statute cannot be

thought to have compulsory signification in the sense that the rights of parties and the public fail utterly of possibility of enforcement if there has been a delay in making the assignment of the judges. Important public and private interests ordinarily are not intended to be made dependent wholly upon the performance of a duty by a public officer at a given moment of time. When the word "shall" is used for fixing the time for the performance of official duty, where private rights are not directly concerned, it commonly is construed to be directory rather than mandatory. The act imposes an imperative obligation upon the Chief Justice to make the assignment. It indicates the time when the assignment ought to be made. But the jurisdiction of the court over the parties is not impaired if the assignment of the three judges is made in season to perform the duties established by the statute. *Cheney* v. *Coughlin*, 201 Mass. 204, 211, 212, where earlier cases of this and other courts are collected and reviewed. *Rutter* v. *White*, 204 Mass. 59. *Pevey* v. *Aylward*, 205 Mass. 102. *Rea* v. *Aldermen of Everett*, 217 Mass. 427, and cases cited at 430. It follows that the respondents are not without jurisdiction on this ground to consider the election petition.

3. It is argued that the corrupt practices act is unconstitutional on several grounds.

(a) The provision that three judges of the Superior Court "for the hearing and determination of all matters arising under election petitions during the ensuing year," "shall each year, immediately following the annual State election," "be assigned by the Chief Justice of said court," does not contravene c. 2, § 1, art. 9 of the Constitution to the effect that "All judicial officers . . . shall be nominated and appointed by the Governor, by and with the advice and consent of the council."

The election petitions established by the corrupt practices act are proceedings in the Superior Court. The act provides that all election petitions shall be brought in the Superior Court in the County of Suffolk, that they can be brought only by permission granted by a Superior Court judge after an *ex parte* preliminary hearing, and that they shall be entered in a separate docket by the clerk of the Superior Court for Suffolk County. They are to be heard and determined by three judges of the Superior Court. From beginning to end the matter is conducted by the judges,

recorded upon the records, and the papers are kept in the custody of the clerk, of the Superior Court. No new court is established. No new tribunal is created. A new kind of procedure is created. In some respects the practice is regulated in considerable detail and is made radically different from that heretofore prevailing in more familiar classes of litigation. But the jurisdiction is conferred upon an existing court.

The Legislature may provide that particular causes may be tried before one or more judges of any court. The history of statutory changes respecting the trial of indictments for capital offences, from the original requirement that all such trials must be before this court sitting *en banc* to the present provision that they be had before a single judge of the Superior Court, is an illustration of the power of the Legislature in this regard. *Commonwealth* v. *Phelps*, 210 Mass. 78. The authority of the Legislature to transfer jurisdiction from justices of the peace to the judges of the Police Court and conferring upon the latter a new name, was confirmed by *Wales* v. *Belcher*, 3 Pick. 508. *Brien* v. *Commonwealth*, 5 Met. 508. It was held in *Dearborn* v. *Ames*, 8 Gray, 1, that jurisdiction over insolvency matters previously vested in elective officers whose election was provided for by the constitution, might be transferred to a regularly constituted court.

There are numerous instances where the hearings must be had before two or more judges. Allusion has already been made to trials of capital cases. Jurisdiction was conferred by R. L. c. 201, § 2 upon three judges of the Superior Court to hear claims against the Commonwealth in excess of $1,000. Provision is made by R. L. c. 157, § 5 for trial of certain civil causes before three judges of the Superior Court. The assignments of the judges to hold the court in all these cases must of necessity be made by the Chief Justice. It is expressly provided by St. 1912, c. 649, § 8, that the three judges of the Municipal Court of the City of Boston to hold the Appellate Division of that court thereby established, shall "be designated from time to time by the Chief Justice" of that court. It never has been suggested in any of the numerous cases which have been appealed from the Appellate Division of that court that there was anything unconstitutional in its organization. The most ancient and familiar illustration of division

of work is in the Supreme Judicial Court, where constantly certain justices are sitting as the quorum of the full court and others are holding court as single justices. It requires no argument to demonstrate that the designation of the justices to sit as the full court is a judicial duty.

The circumstance, that under the instant statute the three judges assigned are to hear all the election petitions brought during the year, is immaterial in this connection. It is a well known practice for the assignments of judges to specific duties to be made for the period of a year.

It is an appropriate function of the office of Chief Justice to make such assignments as are required by this statute. It is a detail in the efficient administration of justice by courts composed of several judges that the Chief Justice should arrange a division of work among the different judges in such way as to promote the transaction of the business of the court in the most satisfactory manner. It is the performance of a strictly judicial duty.

No new court is established and no new judges are required by the corrupt practices act. An existing court is given jurisdiction of a new kind of litigation, and provision is made for designation in the ordinary way of judges already commissioned, to perform the duties arising from the new kind of jurisdiction. The conclusion is imperative that the act is not violative of the constitutional requirement that all judges shall be appointed by the Governor.

It is not necessary to inquire whether the subject of elections is so much in the nature of a political question that the Legislature is unlimited in its power to establish tribunals and fix their jurisdiction to deal with election to public office, and may even treat it as an executive or administrative function and not so judicial in character as necessarily to be vested in the courts. See in this connection *State* v. *Lewis*, 51 Conn. 113; *Williamson* v. *Lane*, 52 Texas, 335; *Lynch* v. *Chase*, 55 Kans. 367, 371; *State* v. *Hawkins*, 44 Ohio St. 98, 109; *Ewing* v. *Filley*, 43 Penn. St. 384, 390. Nor is it necessary to consider whether the principle of *Young* v. *Blaisdell*, 138 Mass. 344, may be applicable.

(b) The right of trial by jury as secured by the Constitution is not denied by the act. The Declaration of Rights by art. 15

holds sacred the right to a trial by jury "In all controversies concerning property and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised." It was decided in *Attorney General* v. *Sullivan*, 163 Mass. 446, 451, 452, that a public office like that of mayor is not "property" as that word is used in the Declaration of Rights. A public office does not possess the attributes of private property. Any office created by the General Court, and not established by name or tenure by the Constitution, "may be regulated, limited, enlarged or terminated by law, as public exigency or policy may require." *Taft* v. *Adams*, 3 Gray, 126, 130. A public office is not the private property of the person elected to it. It is a public trust, to be held and administered entirely and absolutely for the benefit and in the interest of the people. This rule prevails generally. *Attorney General* v. *Jochim*, 99 Mich. 358, 367. *People* v. *Coler*, 173 N. Y. 103. *Prince* v. *Skillin*, 71 Maine, 361, 365. *Donahue* v. *County of Will*, 100 Ill. 94. *Taylor* v. *Carr*, 125 Tenn. 235. *Mason* v. *State*, 58 Ohio St. 30. *Moore* v. *Strickling*, 46 W. Va. 515, 518. *State* v. *Douglas*, 26 Wis. 428, 432. *Hawkins* v. *Roberts & Son*, 122 Ala. 130. *Gray* v. *McLendon*, 134 Ga. 224, 251, 252. Therefore, it follows that so far as concerns the question of property, no jury trial need be provided in trials as to the title to a public office.

The right to vote also is in its nature political and not property. *Kinneen* v. *Wells*, 144 Mass. 497. Cooley Const. Lim. (7th ed.) 901. See cases collected 1 L. R. A. 111, note.

The election petition provided by the corrupt practices act is not a "suit between two or more persons" in the sense in which those words are used in the Declaration of Rights. The right to contest an election in the manner and to the extent set forth in the instant statute is not either in form or in substance a common law right. It is not in its essence a controversy between two parties in the sense of ordinary litigation. It is in its nature an inquiry into the purity of the election. A corrupt practice is defined by § 368 of the act as amended.*

* The provisions referred to are as follows: "A candidate shall be deemed to have committed a corrupt practice who shall, either by himself or by another, violate the provisions of section three hundred and forty-eight relative to the expenditure of money in excess of the amounts therein authorized;

The election petition must be confined to a request for an investigation respecting the matters enumerated in this section of the act. It must be brought by five persons whose only qualification as petitioners is that they were voters qualified by law to vote at the election as to which complaint is made. They have no private interest to subserve. The purity and freedom of elections is fundamental in a republican form of government. Scarcely anything can be conceived of more vital to the public welfare than free and honest elections. An election petition cannot be brought without leave first obtained from a judge who must certify after hearing that he is satisfied that there is reasonable cause not only to believe that a corrupt practice was committed with reference to the particular election, but also that upon the evidence obtainable the corrupt practice may be successfully proved. An election petition once entered in court cannot be discontinued without the consent of the Attorney General. § 366. The judgment entered at the conclusion of the proceeding, if a corrupt practice is found to have been committed, is not in the nature of a remedy for a private wrong but a vindication of an outrage upon the public and a purging of public office from a foul stain. The election is to be declared void and the respondent ousted from office and the office declared vacant. Section 369, as amended by St. 1914, c. 783, § 10. The whole proceeding, throughout, is public rather than private in character. It is in the nature of a quo warranto proceeding. The public,

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who shall make a false return in any statement filed in accordance with sections three hundred and sixty-two and three hundred and sixty-three of this act; who shall, either by himself or another, pay or give, or directly or indirectly, promise to a voter any gift or reward to influence his vote or to induce him to withhold his vote; who shall, either by himself or another, aid or abet a person, who is not entitled to vote, in voting or attempting a vote at a primary or election, or in voting or attempting to vote under a name other than his own, or in casting or attempting to cast more than one ballot; who shall either by himself or another fraudulently and wilfully obstruct and delay a voter; who shall, either by himself or another interfere with, hinder or prevent an election officer from performing his duties, forge an endorsement upon, or alter, destroy or deface a ballot; or who shall, either by himself or another, tamper with or injure or attempt to injure any voting machine or ballot box to be used or being used in an election, or shall prevent or attempt to prevent the correct operation of such machine or box."

instead of being represented at the initiatory stages by the Attorney General, is in effect represented by the five voters acting not wholly upon their own volition but upon authorization from the court; and after the bringing of the petition the Attorney General has a limited control over the proceedings. It is no more a suit between persons than is a petition for quo warranto which in *Attorney General* v. *Sullivan*, 163 Mass. 446, 451, was held not to be such suit. In this respect the case at bar is governed by that decision and the petitioner has suffered no legal wrong in being denied a trial by jury. *Kansas* v. *Ziebold*, 123 U. S. 623, 673. See also *Carleton* v. *Rugg*, 149 Mass. 550. Since this is not a pursuit of an individual right, but essentially an inquest into a matter of public import, it does not come within the definition of suit given in *Worcester Color Co.* v. *Henry Wood's Sons Co.* 209 Mass. 105.

(c) The election petition is not criminal in its form. It is expressly provided that such petitions shall be governed by the rules of equity practice and procedure, so far as applicable, in the absence of special rules of court. The act makes distinct provisions in other sections for criminal prosecutions and the election petition throughout is treated as civil in its nature. Since it is in the nature of a quo warranto, it is a civil proceeding and not a criminal prosecution. That has been decided. *Attorney General* v. *Sullivan*, 163 Mass. 446, 449. *Ames* v. *Kansas*, 111 U. S. 449, 460. See also *State* v. *Thompson*, 91 Minn. 279, and *State* v. *Moores*, 56 Neb. 1. But it is contended that a punishment criminal and infamous in its nature is imposed by the act and hence that it is obnoxious to art. 12 of the Declaration of Rights which guarantees a trial by jury in such cases. It is provided by § 497 of the act as amended by St. 1914, c. 783, § 12, that "Whoever is found by final judgment upon an election petition . . . to have committed a corrupt practice, and shall, in accordance with such finding, forfeit the office to which he has been elected, or whoever is convicted in a criminal proceeding of violating any provision of law relating to corrupt practices in elections shall be disqualified as a voter for a period of three years following the date of his conviction, and shall be deemed ineligible to hold public office for said period."

It is urged that deprivation of the right to vote and to hold pub-

lic office for a period of three years, as a consequence of the finding of a corrupt practice having been committed by the defendant in an election petition, is a criminal or infamous punishment. This question must not be treated by itself alone but must be considered in connection with the Fortieth Amendment to the Constitution, which became operative in 1912. That amendment added a new class to those citizens from whom the right of franchise is withheld by art. 3 of the Amendments, namely, "persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections." The effect of this amendment was to confer upon the General Court power to declare by general law disfranchisement as an accompaniment to the commission of corrupt practices in elections. It did not confine or limit its powers in this respect to the establishment of the fact of corrupt practice by criminal rather than by civil proceedings. It conferred by implication the power in broad terms. It gave ample discretion to the Legislature as to the means to be employed for the ascertainment of the fact, by any constitutional means, of a corrupt practice having been committed. It authorized the Legislature to attach disfranchisement to one who had been found by any constitutional means to have violated his public duty by corrupt practices. It places disfranchisement for corrupt practices in connection with elections upon the same footing as disfranchisement because of being a pauper or under guardianship. Manifestly a trial by jury is not required to determine whether one shall be a pauper or placed under guardianship simply because deprivation of the right to vote follows as a result of that status. See *Dowdell, petitioner*, 169 Mass. 387; *Sporza* v. *German Savings Bank*, 192 N. Y. 8. Pauperism and guardianship as matter of common knowledge have been generally established by proceedings in which there is no trial by jury. The circumstance that the Fortieth Amendment does not automatically attach disqualification from voting to all persons found to have committed corrupt practices, but leaves that matter to be settled from time to time by general law, gives no additional constitutional rights to the individual. He cannot demand on that account as a constitutional right that this matter be settled by a jury when he is not otherwise entitled to it. Therefore, it is needless to consider the bearing in this connection of *United States* v. *Waddell*,

112 U. S. 76, *Ex parte Wilson*, 114 U. S. 417, and *People* v. *Kipley*, 171 Ill. 44, 72, relied on by the petitioner, or to discuss whether deprivation of the right to vote and to hold office as isolated factors without the imposition of fine or imprisonment constitute infamous punishment.

Of course the Legislature cannot by a mere change of name or of form convert that which is in its nature a prosecution for a crime into a civil proceeding and thus deprive parties of their rights to a trial by jury. The Constitution cannot thus be trifled with. *Stockbridge* v. *Mixer*, 215 Mass. 415. But there is nothing to prevent the Legislature from enlarging proceedings and remedies in their nature civil, so as to include new matters of the same general character. *Brown's Case*, 173 Mass. 498. *Young* v. *Blaisdell*, 138 Mass. 344. *Renado* v. *Lummus*, 205 Mass. 155, 158. In view of the principles declared in *Attorney General* v. *Sullivan*, 163 Mass. 446, and *Ames* v. *Kansas*, 111 U. S. 449, and in other cases before cited, it is unnecessary to examine *State* v. *Markham*, 160 Wis. 431; *S. C.* 162 Wis. 55, and kindred decisions, or to determine whether in the light of differing constitutional provisions they are inconsistent with the conclusion here reached.

(d) Nothing contrary to the Constitution is perceived in the further provision that one found to have committed corrupt practices shall be deemed ineligible to hold public office. The privilege of voting is so closely connected with the right to hold office that power to deprive of the former may well include the latter. See *Opinion of the Justices*, 7 Mass. 523; *State* v. *Van Beek*, 87 Iowa, 569; *State* v. *Smith*, 14 Wis. 497. Moreover, the power of the Legislature to determine the qualifications required of those elected to fill municipal offices is ample and need not be uniform throughout the Commonwealth. *Graham* v. *Roberts*, 200 Mass. 152, 154, 155. *Cole* v. *Tucker*, 164 Mass. 486. It follows that the act imposes no unconstitutional limitations upon the right to vote or to hold office.

(e) It is not open to serious question that the acts described in the statute as corrupt practices are well within the scope of those words as used in the Fortieth Amendment.

(f) The provision that election petitions shall be entered in the Superior Court in Suffolk County is not violative of any constitutional provision. The General Court is given full power and

authority by c. 1, § 1, art. 3 of the Constitution, — "to erect and constitute judicatories and courts of record or other courts." This ample grant includes by necessary implication power to fix the territorial limits within which such courts shall exercise jurisdiction and the places in which they shall be held. Having created by the instant statute a new kind of civil litigation, there is no basis in the Constitution for limiting the right of the Legislature to say that such causes shall be entered in Suffolk County, where the Superior Court always is in session. The right of the petitioner "to obtain right and justice freely" as guaranteed by art. 11 of the Declaration of Rights is not impaired thereby. The Superior Court being a court of general jurisdiction, there is nothing to prevent the respondents in the exercise of their discretion from hearing election petitions where the public interests require.

(g) It follows from what has been said, without further discussion, that there is nothing in the challenged portions of the act which is in conflict with art. 9 of the Declaration of Rights to the effect that "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." The whole purpose of the act is to promote and insure the freedom of elections by discouraging the improper influence of elections and the pollution of the ballot through corrupt practices.

(h) The contention that the petitioner is denied the equal protection of the laws is untenable. It is elementary that the General Court may make reasonable classifications in selecting the subjects of legislation and determining what shall be included within designated inhibitions. Such classification does not violate the constitutional requirement for equal protection of the laws unless "plainly and grossly oppressive and unequal, or contrary to common right." *Oliver* v. *Washington Mills*, 11 Allen, 268, 279. A classification, general in its nature, will not be held to be unequal when there appears to be reasonable ground for it, but only when it seems to be simply arbitrary, based upon no sound distinction and not founded upon any natural difference or rational discrimination. See *Commonwealth* v. *Libbey*, 216 Mass. 356, 358; *Young* v. *Duncan*, 218 Mass. 346, 353; *Bogni* v. *Perotti*, 224 Mass. 152, 157; *Tax Commissioner* v. *Putnam*, 227 Mass. 522, and cases cited

in each of these decisions. It is impossible in the nature of things to remove from office as a consequence of corrupt practices any except those who have been elected. Disfranchisement and ineligibility to hold office attach equally to everybody convicted of the violation of the criminal provisions of the act. The circumstance that no like civil proceeding is provided against defeated candidates for public office does not render the act unequal in a constitutional sense. The successful perpetration of a wrong ordinarily is punished in law by a more severe penalty than a thwarted attempt to commit the same wrong. This is true even in prosecutions for crimes, although the moral turpitude may be as great in one case as in the other.

(i) There is no constitutional inequality in the provision that election petitions shall be brought and may be heard in Suffolk County, while prosecutions for criminal violation of the election laws must be in the county where the crime is alleged to have been committed. Misdemeanors may be tried and finally disposed of in local courts, while felonies of a certain magnitude can be disposed of finally only at the county seat, even upon plea of guilty. Similar differences as to places of trial are found between the Probate Courts, the Land Court, the Superior Court and the Supreme Judicial Court sitting at *nisi prius*.

(j) The limitation in § 371 of the act as amended by St. 1914, c. 783, § 11, excepting from its operations elections of town officers in towns of less than ten thousand inhabitants, does not impair the constitutional validity of the act. The New England town meeting system of elections and government in comparatively small communities is proverbial as one of the finest illustrations of practical democracy. The intimate knowledge that each voter in such comparatively small communities is likely to possess touching the honesty and general qualifications of his fellows and of all candidates for election to public office well may have been regarded as the best security against political corruption. The difference in this respect between large and small municipalities furnishes a manifestly reasonable line of demarcation. The precise point at which that line is drawn in the present instance clearly is not irrational. *Cole* v. *Tucker*, 164 Mass. 486. *Opinion of the Justices*, 138 Mass. 601, 603. *Cunningham* v. *Mayor of Cambridge*, 222 Mass. 574, 577. *Brown's Case*, 173 Mass. 498.

Hayes v. *Missouri*, 120 U. S. 68. *Mallett* v. *North Carolina*, 181 U. S. 589. *Ocampo* v. *United States*, 234 U. S. 91.

(k) The act is not in derogation of the constitutional powers of the Supreme Judicial Court. It is not necessary to discuss this subject at large. This court is recognized as the court of highest final decision by § 10 (*d*) of said c. 783. It is not necessary to determine the extent or nature of the powers of this court to correct errors of law committed by the judges of the Superior Court if in any case there should be an unreasonable refusal to report a question to this court. This conclusion does not shake in any degree what was said by Chief Justice Shaw in *Commonwealth* v. *Anthes*, 5 Gray, 185, 232–236, as to the basis in the Constitution for the Supreme Judicial Court and the scope of its general powers. The strength of that discussion and reasoning stands unimpaired.

(l) The act is not in conflict with any provision of the Federal Constitution.

The trial by jury secured by the Seventh Amendment to the Federal Constitution relates only to the courts of the United States. *Bothwell* v. *Boston Elevated Railway*, 215 Mass. 467, and cases cited at page 471. *Walker* v. *Sauvinet*, 92 U. S. 90.

(m) Trial by jury is not essential to the due process of law secured by the Fourteenth Amendment to the United States Constitution. *Montana Co.* v. *St. Louis Mining & Milling Co.* 152 U. S. 160, 171. *Dowdell, petitioner*, 169 Mass. 387. The instant act purports to afford to all defendants in election petitions a full and fair trial before impartial judges according to fixed laws applicable alike to all persons similarly situated. This is a sufficient compliance with the Fourteenth Amendment. *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380.

(n) The right to hold an elective public office is not a property right within the meaning of the Fourteenth Amendment to the Federal Constitution. If the petitioner should be deposed from the office of mayor by act of the Legislature or by any judicial proceeding in the courts founded on such act, no property right secured by that amendment would be invaded. That was settled after great deliberation, with ample review of the authorities and a full discussion of fundamental principles, in *Taylor* v.

Beckham, 178 U. S. 548, 575, 577, *Attorney General* v. *Tillinghast*, 203 Mass. 539, 545.

(o) It was said by Chief Justice Field in *Stone* v. *Smith*, 159 Mass. 413, "It is settled that the right to vote is not one of the privileges or immunities of citizens of the United States within the meaning of Art. XIV of the Amendments to the Constitution of the United States. *United States* v. *Cruikshank*, 92 U. S. 542. *United States* v. *Reese*, 92 U. S. 214. *Ex parte Yarbrough*, 110 U. S. 651. *Minor* v. *Happersett*, 21 Wall. 162." It follows that the provisions of the present act as to deprivation of the right to vote and to hold office are not in contravention of the United States Constitution. *Guinn* v. *United States*, 238 U. S. 347, 362, 363. *Myers* v. *Anderson*, 238 U. S. 368.

(p) It was held in *Dinan* v. *Swig*, 223 Mass. 516, that so much of St. 1914, c. 783, § 10, as undertakes to impose upon the courts the duty of inquiry into corrupt practices of members of the General Court was contrary to c. 1, § 3, art. 10 (and see c. 1, § 2, art. 4) of the Constitution which makes each branch of the General Court the final judge of the returns, elections and qualifications of its own members. It is a well settled principle of constitutional law that one part of a statute may be contrary to the Constitution, while the rest may stand as valid, provided the two parts are distinct and in their nature separable the one from the other and are not so interwoven and mutually dependent as to require the belief that the Legislature would not have enacted the one without the other. *Warren* v. *Mayor & Aldermen of Charlestown*, 2 Gray, 84, 98, 99. *Commonwealth* v. *Petranich*, 183 Mass. 217, 220. *County of Berkshire* v. *Cande*, 222 Mass. 87, 90, 91. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 380. *Berea College* v. *Kentucky*, 211 U. S. 45, 55. *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 113. It seems plain that the provisions as to corrupt practices of members of the General Court are quite distinct and separable from the rest of the act and have no necessary and inherent connection with its other parts. The section in question dealt with that matter differently from the way in which the act dealt with other corrupt practices. The Legislature evidently recognized that they constituted two different classes of officers under the Constitution and must be treated differently. The failure of the effort to include members of the Legislature has

little connection with the rest of the statute, which can stand precisely as enacted in its application to a large number of highly important offices. A similar decision upon this point was made in *Diehl* v. *Totten*, 32 No. Dak. 131.

It is manifest that the election petition against the petitioner does not raise questions as to the right to free speech and freedom of the press. Although he has referred to these questions, he has not argued them at any length and doubtless they are not open to him. *McGlue* v. *County Commissioners*, 225 Mass. 59, and cases collected at page 60. *Rail & River Coal Co.* v. *Industrial Commission of Ohio*, 236 U. S. 338, 349. It is, therefore, unnecessary to consider them. See *Adams* v. *Lanadon*, 18 Idaho, 483; *State* v. *Pierce*, 163 Wis. 615; *Ex parte Harrison*, 212 Mo. 88.

4. It has been assumed in favor of the petitioner in the discussion thus far, but without examining critically the matter of remedy, that prohibition would be open to him. But it is plain that the fourth general point urged by him, — namely, that the subpoena having been made returnable fifteen instead of fourteen days after the filing of the petition, he cannot be held to answer the election petition, — cannot properly be considered on a petition for a writ of prohibition. The principles which govern the issuance of that extraordinary writ are well settled. It will not be granted if the Court or tribunal against which it is sought has jurisdiction of the cause or matter which it proposes to adjudicate. Prohibition lies only to restrain a clear excess of jurisdiction about to be committed against one who has not submitted thereto where there is no other adequate remedy. It does not issue to correct or restrict errors or irregularities of a tribunal which is acting within its jurisdiction, although proceeding improperly in the exercise of that jurisdiction. It can be invoked to prevent a court from exercising a jurisdiction which it does not possess. It will not be granted to remedy the errors of a judicial tribunal acting within its jurisdiction, but lies only to restrain such tribunal from acting outside its jurisdiction. *Washburn* v. *Phillips*, 2 Met. 296, 298, 299. *Connecticut River Railroad* v. *County Commissioners*, 127 Mass. 50. *Hyde Park* v. *Wiggin*, 157 Mass. 94, 99. *Tehan* v. *Justices of the Municipal Court*, 191 Mass. 92. *Welch* v. *Fox*, 205 Mass. 113. *Mayor of Somerville* v. *Justices of the Police Court*, 220 Mass. 393, 396. *Ex parte*

Oklahoma, 220 U. S. 191, 208. It has been held in the application of these principles that, where a tribunal is acting under an unconstitutional statute, it may thus be restrained. *Connecticut River Railroad* v. *County Commissioners*, 127 Mass. 50. It already has been pointed out that the election petition here complained of is pending before a legally constituted court, which has jurisdiction over the subject matter. The petitioner has appeared specially in answer to the election petition and has pleaded specially the matter of which he here complains. But he brought his present petition within a few days after filing that special appearance and plea, without waiting for the Superior Court to pass upon its merits. It appears from the record that immediately upon the filing of the present petition all proceedings upon the election petition were suspended. The matters set out in the special plea of the petitioner in the election petition are clearly within the jurisdiction of that court. It is provided by the corrupt practices act, § 369, as amended by St. 1914, c. 783, § 10 (*d*), that "Upon an election petition the decision of the three justices of the Superior Court assigned as aforesaid, or of a majority of them, shall be final and conclusive upon all matters in controversy, whether interlocutory or final, and whether in matters of fact or matters of law. But the said justices, or a majority of them, may in their discretion, after a finding of facts, either of their own motion or at the request of either party, report the case to the Supreme Judicial Court for determination by the full court." Without passing upon the scope or signification of these provisions, it is not open to question that jurisdiction of this matter is vested in the Superior Court. There is no suggestion that the petitioner's special plea will not be considered on its merits by the Superior Court and decided according to its view of the law. It is an indubitable result of well settled principles that this point is not open to the petitioner in this proceeding.

Petition dismissed.

UNIVERSAL OPTICAL CORPORATION *vs.* GLOBE OPTICAL COMPANY.
COLUMBIA ELECTRICAL ENGINEERING COMPANY *vs.* SAME.
BOSTON OPTICAL COMPANY *vs.* SAME.
HARWOOD BROTHERS *vs.* SAME.

Suffolk. March 29, 30, 1917. — May 25, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Scire Facias. Trustee Process. Municipal Court of the City of Boston.

A writ of scire facias issued under R. L. c. 189, §§ 45–49, to enforce a judgment charging the defendant as trustee in an action brought by trustee process, is not an independent civil action but is a judicial writ to enforce a judgment and is a part of the proceedings in the original action.

Where in an action brought by trustee process in the Municipal Court of the City of Boston a person summoned as trustee has been charged as such trustee, and on a report of the case at the request of such trustee to the Appellate Division the judgment is affirmed, and no appeal to the Supreme Judicial Court of the Commonwealth under St. 1912, c. 649, § 9, as amended by St. 1914, c. 35, § 4, is taken by the trustee, in a writ of scire facias brought by the original plaintiff against the trustee to enforce the judgment against him as such trustee, the trustee has no right of appeal to the Superior Court from a judgment against him upon the scire facias.

FOUR WRITS OF SCIRE FACIAS in the Municipal Court of the City of Boston dated June 17, 1915, against the Globe Optical Company, a corporation, which had been charged as trustee in four actions brought by trustee process against the New England Wholesale Opticians, Incorporated, a corporation, as the principal defendant.

In each of the cases judgment was entered against the Globe Optical Company for the amount claimed with interest and costs. In each case the Globe Optical Company appealed to the Superior Court.

In the Superior Court the four cases were heard together by *Dubuque*, J., without a jury. At the beginning of the trial the plaintiffs moved that the cases be dismissed for want of jurisdiction. The judge admitted evidence *de bene*, by which it appeared that in each of the four original actions brought in the Municipal Court of the City of Boston by trustee process, in which the Globe Optical Company was summoned as trustee, there was a report to the Appellate Division at the request of the alleged trustee,

that in each case the Appellate Division ordered that the Globe Optical Company be charged as trustee and that in none of the cases was there any appeal to the Supreme Judicial Court for the Commonwealth under St. 1912, c. 649, § 9, as amended by St. 1914, c. 35, § 4.

The judge ordered that in each case the appeal be dismissed for want of jurisdiction and that the papers in the case be remanded to the Municipal Court of the City of Boston, and reported the cases for determination by this court. If the ruling of the judge was right, the order was to stand and the cases were to be remanded to the Municipal Court of the City of Boston. If the ruling was wrong, there was to be a new trial.

R. H. Montgomery, for the plaintiffs.

F. D. Fuller, for the defendant.

BRALEY, J. It has been decided repeatedly that the original action by trustee process and the writ of scire facias provided by R. L. c. 189, §§ 45–49, where the trustee upon demand does not pay over to the officer goods, effects or credits sufficient to satisfy the execution which is to be sued out from the court where judgment was rendered, and the execution is not satisfied otherwise, "are part of one continued and connected course of proceedings," and that "the examination of the trustee" in the scire facias "is to be in the same manner and with the same effect" as in the original action. It is plain that no provision is made for a jury trial, as the answers of the trustee to interrogatories propounded to the trustee in scire facias are to be considered as true and conclusive, although either party may allege and prove facts not stated or denied by the trustee, which may be material in determining how far the trustee is chargeable. *Bickford* v. *Boston & Lowell Railroad*, 21 Pick. 109, 113. *Fay* v. *Sears*, 111 Mass. 154. *Phillips* v. *Meagher*, 166 Mass. 152. *Koontz* v. *Baltimore & Ohio Railroad*, 220 Mass. 285.

When thus used the scire facias is in no sense an independent civil action, but is a judicial writ to enforce a judgment charging the trustee either upon his answer admitting goods, effects or credits, or after he had been defaulted. *M'Gee* v. *Barber*, 14 Pick. 212, 215. *Gray* v. *Thrasher*, 104 Mass. 373, 375. *Perkins* v. *Bangs*, 206 Mass. 408, 415.

It follows that, the original actions not having been removed

from the Municipal Court to the Superior Court in accordance with the St. of 1912, c. 649, §§ 2, 3, as amended by St. 1914, c. 35, § 2, and St. 1914, c. 409, and the question whether the trustee was chargeable having been taken by him to the Appellate Division, who ordered that the trustee be charged, and no appeal from this order having been taken to this court under St. of 1912, c. 649, § 9, as amended by St. 1914, c. 35, § 4, the ruling that the Superior Court was without jurisdiction to entertain the appeals was correct. *Perkins* v. *Bangs*, 206 Mass. 408, 416.

The order dismissing the appeals and directing that the papers be transmitted to the Municipal Court of the City of Boston is to stand. *Dion* v. *Powers*, 128 Mass. 192.

So ordered.

WILLIAM KIRBY *vs.* SAMUEL B. DONOVAN & another.

Suffolk. November 22, 23, 1916. — September 12, 1917.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

Jurisdiction. Equity Jurisdiction, To restrain enforcement of bond to dissolve injunction in another suit, To avoid alleged collusive decree.

If a plaintiff in a suit in equity can show that a certain decree made in another suit in equity was erroneous, that does not tend to show that the court which made the erroneous decree had no jurisdiction to make it.

In a suit in equity to enjoin the defendants from enforcing a bond, given to dissolve an injunction in another suit and signed by the plaintiff as principal and by a corporation as surety, it does not help the plaintiff to show that the bill in equity on which the injunction was granted was amended without notice to the surety, if the amendment was immaterial because the injunction was granted on the allegations of the original bill as it stood before the amendment.

In a suit in equity to enjoin the defendants from enforcing a certain bond given to dissolve a temporary injunction in another suit and signed by the plaintiff as principal, on the ground that the interlocutory decree granting the temporary injunction was void because procured by collusion, the plaintiff sought to make out the alleged acts of collusion and conspiracy wholly by circumstantial evidence, there being no direct evidence on the subject, and the single justice who heard the case found that the defendant in the other suit had determined in some way to injure the plaintiff in the present suit financially, but he did not find that the plaintiff in the other suit had conspired with the defendant in the other suit to carry that determination into effect, and for that reason ordered that the bill be dismissed. Upon an appeal by the plaintiff, on a review of the evidence, it was *held* that the finding of the single justice was correct and must stand.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 4, 1916, praying that the defendant Samuel B. Donovan be restrained from bringing or maintaining any action at law against the plaintiff as principal or against the New England Casualty Company as surety upon a bond to dissolve a temporary injunction granted in a suit in equity brought by the defendant Samuel B. Donovan against Joseph A. Donovan and the present plaintiff, as described in the opinion.

The case was heard by *Carroll*, J., who made a memorandum of decision, containing the findings that are stated in the opinion. He ordered that the bill be dismissed. The plaintiff made requests for findings and rulings, and the single justice made an order upon these requests in which he refused to make certain of the findings and rulings requested. The plaintiff appealed from this order. Later the justice made a final decree ordering that the bill be dismissed without costs. From this decree the plaintiff appealed, the evidence being reported as taken by a commissioner appointed under Chancery Rule 35.

H. Bergson, (*W. A. Parker* with him,) for the plaintiff.

A. T. Smith, (*M. H. Sullivan* with him,) for the defendant Donovan.

LORING, J. This is an appeal from a decree dismissing a bill brought to enjoin the defendant Samuel B. Donovan from enforcing a bond to dissolve an injunction signed by the plaintiff Kirby as one of the principals and by the New England Casualty Company as surety.

The facts are these: In November, 1912, the defendant Samuel B. Donovan brought a bill in equity in the Superior Court alleging that he was entitled to a one quarter interest in the profits of a real estate partnership for buying, developing and selling four specific parcels of land therein described; that Joseph A. Donovan, (brother of Samuel B. Donovan, the plaintiff in that bill,) managed the affairs of the partnership, receiving all moneys due it and paying all obligations incurred by it; that the title to the four parcels was originally taken by Joseph; that Joseph kept the title to one parcel throughout but that he conveyed the title to the other three to Kirby; that Joseph A. Donovan was entitled to a one quarter interest and that Kirby was entitled to the other one half interest in the profits of the partnership. It further was

alleged that the plaintiff's one quarter interest in one of the four parcels was assigned by him to his wife and by a later amendment she was made a party plaintiff. The bill sought an accounting for the one quarter interest owned by the plaintiff (Samuel) in the three parcels and that owned by his wife in the fourth parcel. When the bill was filed an "ad interim" injunction issued restraining Joseph and Kirby from parting with the title to any one of these parcels of the land. By its terms the "ad interim" injunction was to be continued until a stipulation was filed by the defendants. In place of filing a stipulation, the defendants (Kirby and Joseph A. Donovan, with the New England Casualty Company as surety,) gave the bond here in question to dissolve the injunction. The condition of the bond was for payment "to the complainant in said Bill in Equity" of the amount of any decree which he may recover in said suit within thirty days after the entry thereof. The case was sent to a master. The main issue originally tried before the master was the extent of the partnership agreement. At the original hearings before the master Samuel's one quarter interest in the parcel which was the subject of the assignment to his wife was admitted, but both Joseph and Kirby denied his interest in the other three parcels of land. The master filed a report in favor of the plaintiffs, establishing the plaintiffs' right to a quarter interest in all four parcels of land, but he did not find the amount of the profits to which they were entitled. Thereupon the case was recommitted to the master, and by his supplemental report the master found that Samuel's wife would have received as her share of the profits of the parcel of land to which she was entitled "if the defendent Joseph A. Donovan had fully performed his contract with her or for her benefit" $512.81 beyond the amount that she had received. With respect to the other three parcels he made a similar finding in favor of Samuel in the sum of $6,782.59. Later a final decree was entered dismissing the bill as to the defendant Kirby and directing the defendant Joseph A. Donovan to pay to the two plaintiffs respectively the two sums mentioned above. No appeal from this decree was taken by Joseph. Nor did Kirby take an appeal in Joseph's name on the ground that as a person made liable if Joseph was liable he had a right to be heard on Joseph's liability.

Kirby did undertake to take an appeal as a party to the suit.

That appeal was dismissed as reported in 223 Mass. 6. On his appeal being dismissed, (as the result of the decision in *Donovan* v. *Donovan,* 223 Mass. 6,) Kirby brought in the Supreme Judicial Court the bill in equity now before us. By this bill he seeks to have Joseph enjoined from enforcing the bond given to dissolve the temporary injunction on two grounds: First, on the ground that he had an equitable defence to the bond in that the surety (the New England Casualty Company) had an equitable defence to it. This is based on allegations (contained in the bill) that to induce the casualty company to sign the bond he (Kirby) had deposited with it securities under an agreement by which the casualty company could reimburse itself out of those securities for any sum which it was forced to pay upon the bond; and that by reason of this deposit of securities he had a right to insist upon the casualty company setting up its defence and so to have it enjoined from paying the bond. The second ground on which Kirby undertook to enjoin Samuel from enforcing the bond was that the decree in the Superior Court (by which Joseph was directed to pay to the plaintiff the sum of $6,782.59) was collusively procured through a conspiracy between Joseph and Samuel. At the argument in this court Kirby set up an additional and third ground, namely, that the Superior Court had no jurisdiction to make the final decree for the payment to Samuel and his wife of the sums it directed Joseph to pay to them.

1. We take up the last contention. This contention is founded on the proposition that the bill brought in the Superior Court by Samuel was a bill to reach and apply the interest of Kirby and Joseph in the partnership real estate in satisfaction of a claim for unliquidated damages which he (Samuel) had against Joseph for breach of his contract to give him a one quarter interest in the profits of the partnership covering the four parcels of land in question. And he relies upon the decision in *H. G. Kilbourne Co.* v. *Standard Stamp Affixer Co.* 216 Mass. 118, in which it was decided that a bill to reach and apply does not lie to enforce a claim for breach of a contract where the damages are unliquidated. He contends further that if the bill as originally brought was not a bill to reach and apply it became so by the amendment which was made by Samuel on the coming in of the master's first report. On the coming in of the master's first report Samuel's counsel in place of

asking a recommittal to have the master ascertain the amount of profits in the real estate partnership which Samuel and his wife were entitled to, filed a motion to amend the bill by adding prayers that the plaintiffs might be given a decree "for the amount of damage sustained by them, either or both of them" (1) "by reason of the act or acts of the defendant, Joseph A. Donovan, as set forth in the master's report;" (2) "by reason of the defendant, Joseph A. Donovan, breaking his agreement with either or both of them, as shown by the master's report;" and (3) "by reason of the acts of the defendant, Joseph A. Donovan, in avoiding his contract with them, either or both of them, as set forth in the master's report," and also for general relief. The form of this amendment was of no consequence because the amount found due by the master was the amount of profits to which the plaintiffs were entitled in the real estate partnership and the decree entered upon the master's report giving the plaintiffs the profits in the real estate partnership to which they were respectively entitled was a decree that might have been made on the original bill without the amendment.

It is plain that there is nothing in the contention that the court had no jurisdiction. There does not seem to have been any error in the decree made by the Superior Court. But what Kirby has undertaken to make out is that the Superior Court had no jurisdiction to enter the decree which it entered. He would not have made out that proposition if he had shown that the decree was an erroneous one. Whether there was or was not error in the decree is not the question. The Superior Court is a court of general jurisdiction both in law and in equity. It had jurisdiction of the subject matter of the bill brought against Joseph and Kirby by Samuel and it had jurisdiction of both of the defendants; both of them were in court actively defending the suit. Under those circumstances the Superior Court had jurisdiction to enter the decree. The most that the present plaintiff's contention amounts to is that the Superior Court made an error in making the decree made by it. It is one thing for a court having a right to make a decision to make a wrong one. It is another thing to have no right to make a decision at all. To make out lack of jurisdiction in the Superior Court to make the decree here in question Kirby had to make out that the Superior Court had no right to make a decision in the premises right or wrong. See, for example, *Tehan* v. *Justices of*

Municipal Court of Boston, 191 Mass. 92; *Welch* v. *Fox*, 205 Mass. 113; *Tracy* v. *Maloney*, 105 Mass. 90. There is no color for this suggestion.

2. The plaintiff's second contention is that the amendment was an amendment which the court had no right to allow and therefore the casualty company was discharged even if he (Kirby) was not discharged. The amendment was allowed after Kirby had been heard on the matter. It does not appear that the casualty company had notice of the motion. The contention is disposed of by the fact that the amendment relied upon was of no consequence. The decree which was finally made was a decree which might have been made under the original bill. We say that it might have been made under the original bill, because the finding of the master was a finding as to the amount due if Joseph had performed his contract, that is to say, it was a finding as to the amount of the profits to which Samuel and his wife respectively were entitled and was not a finding as to damages for breach of a contract. Under these circumstances it is not necessary to consider other objections to the plaintiff's right to maintain the bill on this ground.

3. The last contention is that the decree which was entered by the Superior Court was a collusive decree entered through a conspiracy between Joseph and Samuel.

There was no direct evidence in this case that the decree made by the Superior Court was procured through collusion pursuant to a conspiracy between Samuel and Joseph. The plaintiff undertook to make out the acts of collusion and conspiracy by circumstantial evidence. It is pre-eminently a case therefore where the rule applies that the findings of the single justice who saw the witnesses must stand unless they are plainly wrong.

We have read the testimony and the whole of it and we are of opinion that the finding of the single justice must stand. We state this proposition in these terms because it is the form in which the question is presented to us and not because we have any doubt of the correctness of the finding of the single justice.

It appears in evidence and by the finding of the single justice that while the hearings were going on before the master Joseph got into financial difficulties and applied to Kirby for help and that Kirby refused to help him. "Upon this refusal Joseph Donovan determined in some way to injure Kirby financially." After-

wards (and before the hearings before the master were ended) Joseph and Samuel entered into an agreement by which a decree was to be entered in favor of Samuel in the sum of $7,000. A motion for the entry of a decree pursuant to that agreement was made in the Superior Court at which Kirby's counsel was present. Upon objection being made by Kirby's counsel the court refused to enter a decree on that agreement. As a result the hearings before the master were resumed and the master made the supplemental report upon which the final decree was made. About the time of the falling out between Joseph and Kirby, Joseph dismissed the counsel who up to that time had appeared for both Kirby and himself and retained another attorney. At the hearing which resulted in the entry of the final decree Kirby was represented by counsel who theretofore had appeared for both Joseph and himself and Joseph was represented by his new attorney. The result of that hearing was the entry of the final decree in the Superior Court by which (1) the bill was dismissed as against Kirby and (2) Joseph was ordered to pay Samuel and his wife the sums mentioned above. The single justice found that Joseph "determined in some way to injure Kirby financially" but he did not find that Samuel conspired with Joseph to carry that determination into effect and for that reason he found that the bill should be dismissed. We are of opinion that his finding was correct and must stand.

We find no error in the order disposing of the plaintiff's requests for findings and rulings.

The decree of the single justice dismissing the bill must be affirmed with costs. It is

So ordered.

ALFRED A. WHITMAN *vs.* THOMAS J. FOURNIER & trustees.

Suffolk. January 10, 1917. — September 12, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CARROLL, JJ.

Bills and Notes. Evidence, Presumptions and burden of proof, Admissions, Of identity. *Estoppel. Practice, Civil,* Interrogatories. *Pleading, Civil,* Answer, Defence of fraud.

In an action on a promissory note against the maker, where the defendant had admitted that he signed the note, but there was no evidence in regard to the indorsement of the note by the third person to whom it was made payable, and the note was introduced in evidence with a signature upon its back purporting to be that of the payee, it was *said* that if nothing more had appeared the presiding judge should have ordered a verdict for the defendant, as an indorsement does not prove itself.

In the case stated above the defendant read to the jury the plaintiff's answers to interrogatories propounded to him by the defendant, in which the plaintiff answered, "There is no indorsement by [the payee] to me. The note in question was indorsed [by the payee] in blank before maturity and for value paid [by a certain firm who] assigned the same to me." The judge ordered a verdict for the plaintiff. *Held,* that the judge was wrong in ordering this verdict, because when the defendant read and put in evidence the answer of the plaintiff, he did not preclude himself from arguing to the jury that the answer was not true, and that therefore the case should have been left to the jury.

In the same case it was stated in the bill of exceptions that the note produced "was printed upon yellow paper," whereas in answer to an interrogatory the plaintiff had stated that the note was not printed on yellow paper, and the defendant contended that he was entitled to go to the jury on the question of the identity of the note, but it was *held,* that no question of identity was open to the defendant, as he had admitted on the witness stand that the note produced was signed by him and that it was the note described in the declaration.

In an action on a promissory note the defence of fraud in the making of the note is not open to the defendant unless it is set up in the answer. Following *Hunting* v. *Downer,* 151 Mass. 275.

CONTRACT for the balance due on a promissory note, originally for $400, payable to the "Thos. Howard Co. (not inc.)" at the office of Knauth, Nachod and Kuhne, bankers, 13 William Street, New York, signed as maker by the defendant and indorsed on the back "Thos. Howard Co., by R. Howard, Atty." Writ in the Municipal Court of the City of Boston dated January 24, 1914.

On removal to the Superior Court the case was tried before *Sanderson,* J. The course of the trial is described in the opinion.

At the close of the evidence, the judge ordered the jury to return a verdict for the plaintiff; and the defendant alleged exceptions.

J. M. Browne, (*J. T. Maguire* with him,) for the defendant.

H. C. Dunbar, for the plaintiff, submitted a brief.

LORING, J. This is an action on a promissory note signed by the defendant as maker and payable to "Thos. Howard Co. (not inc.)." It purported to be indorsed by "Thos. Howard Co., by R. Howard, Atty." At the trial the plaintiff put the defendant upon the witness stand and asked him if the signature upon the face of the note was his signature, and he testified that it was. The promissory note then was offered as an exhibit in the case and the plaintiff rested without introducing any evidence of the genuineness of the indorsement.

If the case had stopped there it is plain that the defendant would have been entitled to a verdict as matter of law for lack of evidence of an indorsement of the note by the payee to the plaintiff.

The plaintiff has contended that the genuineness of the indorsement is presumed until the contrary is proved, and in support of that contention he has relied upon *Wilbour* v. *Turner*, 5 Pick. 526, *Truesdell* v. *Thompson*, 12 Met. 565, *Noxon* v. *DeWolf*, 10 Gray, 343, *Rider* v. *Taintor*, 4 Allen, 356. There is nothing in these cases that gives countenance to that contention. The first, second and fourth of these cases were cases where the note was payable to bearer. There was nothing in the other case (*Noxon* v. *DeWolf*, 10 Gray, 343) which bears upon the question.

After the plaintiff rested, the defendant read to the jury the plaintiff's answers to interrogatories propounded to him by the defendant. The thirty-first answer was in these words: "There is no indorsement by R. Howard to me. The note in question was indorsed by Thomas Howard Company in blank before maturity and for value paid by Knauth, Nachod and Kuhne to Thomas Howard Company. Knauth, Nachod and Kuhne assigned the same to me." If the defendant had testified to the facts stated in this answer to the thirty-first interrogatory the indorsement of the note by the payee to the plaintiff would have been established and so far as that fact was concerned a verdict could have been directed to be entered in favor of the plaintiff. But the defendant never testified to those facts. It was the plaintiff who

stated those facts in answer to an interrogatory propounded to him by the defendant. When the defendant read and thus put in evidence that answer of the plaintiff he did not preclude himself from arguing to the jury that the answer was not true. Therefore there was a question of fact to be passed upon by the jury and the judge was wrong in directing them as matter of law to find a verdict in favor of the plaintiff.

There are two questions which ought to be considered in connection with the new trial.

The defendant contended that he had a right to go to the jury because it is stated in the bill of exceptions that the note produced "was printed upon yellow paper" and in answer to an interrogatory propounded by the defendant to the plaintiff the plaintiff stated that it was not printed upon yellow paper. The defendant's contention is that he had a right to go to the jury on the identity of the note. This contention is not sound. The note produced was admitted by the defendant to have been signed by him and it is the note described in the declaration.

The other contention made by the defendant which ought to be dealt with is that he had a right to put into the case evidence of fraud in the making of the note sued on without having pleaded that fraud as a substantive defence in his answer. Upon this question the case of *Hunting* v. *Downer*, 151 Mass. 275, is decisive against the defendant's contention. The result is that the entry must be

Exceptions sustained.

MUSKEGET ISLAND CLUB *vs.* WILLIAM H. PRIOR & another.

Nantucket. January 12, 1917. — September 12, 1917.

Present: RUGG, C. J., LORING, BRALEY, & DE COURCY, JJ.

Equity Jurisdiction, To compel removal of permanent structure built by one cotenant on land owned in common. *Joint Tenants and Tenants in Common.*

In a suit in equity to compel a defendant to remove an alleged permanent structure built by him on a part of a small island owned in common by a number of persons, including the plaintiff and that defendant, a master found that the island was "a sandy, treeless, barren spot of only a few acres in extent, some two miles in

length and with an average width of half a mile, and was of little value except for fishing and fowling or for the maintenance of buildings for the shelter, comfort or convenience of those engaged in these and similar sports or occupations," and found that the "building is a substantial structure of wood, resting upon posts, having eleven windows in front and three doors." *Held*, that on the findings of the master it must be taken that the building erected by the defendant was a permanent structure and that accordingly an injunction for its removal must be granted.

BILL IN EQUITY, filed in the Superior Court on July 1, 1912, by the Muskeget Island Club, a corporation, against William H. Prior and Charles A. Prior, seeking the removal from a portion of the Island of Muskeget, owned in common by the plaintiff, the defendant William H. Prior and other persons, of a building erected there by the defendant William H. Prior.

The case was referred to a master "to hear the parties, examine their vouchers and evidence, state the accounts, and make report thereof to the court." The master filed a report containing the findings that are stated in the opinion. Later the case was heard upon the master's report by *Wait*, J., who made a final decree ordering that the master's report be confirmed, that the bill be dismissed as to the defendant Charles A. Prior without costs, and that the defendant William H. Prior forthwith remove his house from the premises described in the bill, that he be restrained permanently from further maintaining such a house and that the plaintiff recover its costs against him in the sum of $24.40. The defendant William H. Prior appealed.

The case was submitted on briefs.

M. O. Adams & R. O. Harris, for the defendant William H. Prior.

H. N. Shepard, for the plaintiff.

LORING, J. This is an appeal from a decree directing the defendant William H. Prior to remove a building erected by him on land on Muskeget Island owned in common by a number of persons including the plaintiff and that defendant.

The general rule is well settled that each tenant in common has an equal right of entry, occupation and enjoyment, the possession of one being presumed to be the possession of all. In accordance with this general proposition it has been held on the one hand that one cotenant can enter and take crops of the land owned in common, *Silloway* v. *Brown*, 12 Allen, 30, 37, and that he may pile

boards upon such land, *Keay* v. *Goodwin*, 16 Mass. 1, 4. On the other hand the erection of a permanent building on common land by one cotenant is an ouster of the others. *Bennett* v. *Clemence*, 6 Allen, 10. *Bellis* v. *Bellis*, 122 Mass. 414. *Ingalls* v. *Newhall*, 139 Mass. 268. In such a case the building may be removed by a cotenant. *Byam* v. *Bickford*, 140 Mass. 31. This rule was applied in *Capen* v. *Leach*, 182 Mass. 175, where one cotenant brought a bill to enjoin the others from interfering with a granite monument which he had erected on a burial lot owned by him in common with the defendants.

The master has found that the "building is a substantial structure of wood, resting upon posts, having eleven windows in front and three doors." There is no other finding upon the character of the building here in question unless the finding of the master as to the character of Muskeget Island may be thought to have a bearing upon it. The finding upon that point is in these words: "The island of Muskeget . . . is a sandy, treeless, barren spot of only a few acres in extent, some two miles in length and with an average width of half a mile, and of little value except for fishing and fowling or for the maintenance of buildings for the shelter, comfort or convenience of those engaged in these and similar sports or occupations." On the findings of the master it must be taken that the building erected by the defendant William H. Prior was a permanent structure.

It follows that the entry must be

Decree affirmed with costs.

WILLIAM DANOFSKY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 16, 1917. — September 12, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Street railway. *Carrier*, Of passengers. *Street Railway*. *Pleading, Civil*, Variance, Specifications.

In an action against a corporation operating a street railway for personal injuries, the plaintiff testified that, while he was standing in the aisle of a car of the defendant with his hand in a strap suspended from the top of the car for the

purpose of affording such support, the car "came to a very sudden stop with a terrible jerk, it seemed as though it struck something; that it jerked his hold, he fell through the window, kind of sideways, that his left hand went through as far as his body would let it, that there were other people in the car and three women were taken off; they were pretty well shaken up and water had to be brought to them." Another passenger, who was standing directly back of the plaintiff in the car, testified that the car "came to a sudden stop with a violent jerk; that he had hold of a strap with his left hand and when the car gave that jerk it just threw him around," that he "just managed to hold up" that "his knees kind of left him and he went forward on to the side seat," and described the manner in which the car stopped by saying, "It was more so than an ordinary stop; enough to throw anybody around." *Held*, that there was evidence for the jury of negligence on the part of the defendant in the operation of the car.

In the same case the plaintiff, in compliance with an order of the court made upon a motion of the defendant, filed specifications, which contained a statement that the plaintiff's hold was broken and he was thrown down by the passengers who were thrown off their feet by the sudden stopping of the car. The plaintiff, on his cross-examination, testified that, after he was thrown down, women who were thrown down were thrown on to him. But the plaintiff also testified that he had told his attorney how the accident happened and that what he told his attorney was to the same effect as the statements made in the specifications. *Held*, that the plaintiff's contradictory testimony did not require the finding of a variance between the allegations contained in the specifications and the proof.

In the same case it was stated in the specifications that the negligence relied upon by the plaintiff was negligence of the defendant's motorman, and the defendant contended that there was no evidence that the accident happened through the negligence of the motorman. One of the plaintiff's witnesses testified, in answer to a request to describe the accident, "Why it seems to me as if he threw the application of the brakes on like that (indicating by clapping hands together)." *Held*, that this evidence warranted a finding that the sudden stopping of the car was caused by the negligence of the motorman.

In the same case it was *said* that, under the view of the evidence taken by this court, it was not necessary to consider the defendant's contention that a statement contained in a specification stands in all respects and for all purposes as if it were a part of the declaration.

TORT for personal injuries sustained on October 16, 1914, when the plaintiff was a passenger on a street railway car of the defendant, by reason of the sudden and violent stopping of the car just before it reached the Dudley Street terminal of the defendant in Boston. Writ dated December 7, 1914.

The defendant filed a motion that the plaintiff be ordered to specify in regard to the following matters:

"1. The exact time the accident as alleged in plaintiff's declaration occurred. Please give the year, month, day of month, day of week, hour and minute.

"2. The exact place the accident as alleged in plaintiff's declara-

tion occurred, that is to say, on what street and opposite what number on such street said accident occurred.

"3. What acts or omissions to act the plaintiff relies on as constituting negligence on the part of the defendant as alleged in plaintiff's declaration."

The motion having been granted, the plaintiff filed the following specifications.

"1. The accident occurred on October 16, 1914, at 7.45 P.M.

"2. The place of the accident was the Dudley Street terminal station.

"3. The negligence relied upon is that of the motorman in so operating his car as to cause the passengers therein to be thrown off their feet against the plaintiff, breaking the plaintiff's hold and causing the plaintiff's hand to go through the car window."

The case was tried before *Hardy*, J. The evidence is described in the opinion. At the close of the evidence the judge ordered a verdict for the defendant on all the evidence and the pleadings. The plaintiff alleged exceptions, it being stated in the bill of exceptions that, if the judge had made a wrong ruling in connection with the verdict, the plaintiff was to have judgment in the sum of $500.

H. Bergson, for the plaintiff.

A. E. Pinanski & G. E. Morris, for the defendant, submitted a brief.

LORING, J. The plaintiff testified that while he was a passenger and was standing in the aisle of a car of the defendant railway company with his hand in the strap suspended from the top of the car for the purpose, the car "came to a very sudden stop with a terrible jerk, it seemed as though it struck something; that it jerked his hold, he fell through the window, kind of sideways, that his left hand went through as far as his body would let it, that there were other people in the car and three women were taken off; they were pretty well shaken up and water had to be brought to them." Another passenger who was standing directly back of the plaintiff testified that the car "came to a sudden stop with a violent jerk; that he had hold of a strap with his left hand and when the car gave that jerk it just threw him around." In answer to the question "Was your grip broken?" he said, "Some, I just managed to hold up . . . there were some women in the car

and one of them had to have some water brought to her; that everybody was thrown about in the car more or less." On cross-examination he testified that "his hold was broken somewhat; he did not get his hand out of the strap or fall to the floor; that his knees kind of left him and he went forward on to the side seat." In answer to the question "How do you describe the manner in which that car stopped?" he said: "It was more so than an ordinary stop; enough to throw anybody around."

The presiding judge "directed a verdict for the defendant on all the evidence and the pleadings." The case is here on an exception to that ruling.

1. The defendant's first contention is that the evidence introduced by the plaintiff did not make out a case of negligence in the sudden stopping of the car within the rule of this court established in *Anderson* v. *Boston Elevated Railway*, 220 Mass. 28, and the cases there collected. We are of opinion that it did.

2. The defendant's next contention is that there was a variance between the allegations and the proof. This contention is founded on testimony of the plaintiff not yet stated. On cross-examination the plaintiff testified more than once that after he was thrown down women who were thrown down were thrown on to him; while in his specifications the plaintiff stated that his hold was broken and he was thrown down by the passengers who were thrown off their feet by the sudden stopping of the car. But on this point the plaintiff's testimony was contradictory. He testified both ways. In addition to the testimony just stated the plaintiff was asked: "Do you know where your attorney got that information? That the motorman was so operating his car as to cause passengers therein to be thrown off their feet against you, breaking your hold and causing your hand to go through the car window?" In answer to this question he said: "I told him how it happened." He was then asked "Did you tell him what I have just read?" and the plaintiff answered "Words to that effect." In other words the plaintiff testified that he told his attorney how the accident happened and that what he told his attorney were words to the same effect as the statement made in the specifications.

3. The next contention of the defendant is that there was no evidence that the accident happened through the negligence of the motorman and it is alleged in the specifications that the

negligence relied upon was negligence of the motorman. One of the witnesses put on the stand by the plaintiff testified, in answer to a request that he describe the accident, "Why it seems to me as if he threw the application of the brakes on like that (indicating by clapping hands together)." This justified a finding that the sudden stopping was caused through the negligence of the motorman.

4. Under the view which we have taken of the case it is not necessary to consider the defendant's contention that a statement contained in a specification stands in all respects and for all purposes as if it had been a part of the declaration.

5. It is apparent from what has been said that the ruling directing the jury to find a verdict for the defendant was wrong. In accordance with the stipulation contained in the bill of exceptions the entry must be judgment for the plaintiff in the sum of $500, and it is

So ordered.

INTERNATIONAL PAPER COMPANY *vs.* COMMONWEALTH.

Suffolk. March 29, 30, 1916. — September 13, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Tax, Excise imposed on foreign corporations. *Corporation*, Foreign: taxation. *Constitutional Law*. *Evidence*, Matters of common knowledge, Presumptions and burden of proof.

St. 1914, c. 724, providing that every foreign corporation subject to the excise tax of one per cent of the par value of its authorized capital stock, not exceeding $2,000 in any year, imposed by St. 1909, c. 490, Part III, § 56, shall pay in each year, "in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition," is constitutional and valid.

It here was *said* to be manifest that a State is not debarred from imposing an excise upon the granted privilege of being a corporation because the corporation is engaged in interstate as well as intrastate commerce.

It also was *said* that it seemed to be indubitable that the use by a State of a percentage on the authorized capital stock of a foreign corporation as the measure of an excise or license fee imposed for permission to such foreign corporation to

do an intrastate or local business within its borders is not a decisive element in determining the validity of the imposition of the tax.

The excise for doing business in this Commonwealth lawfully may be imposed under St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724, upon a corporation organized in another State, which carries on the manufacture of paper in this Commonwealth and has a mill within the Commonwealth and a sales office within the Commonwealth where it makes sales of its goods manufactured at its domestic mill to purchasers domiciled in Massachusetts, to whom the goods are delivered by intrastate commerce, although the charter of such corporation authorizes it "to maintain, conduct and manage in the State of New York and elsewhere the business of manufacturing, producing, selling and dealing in any and all kinds of paper," and it maintains and operates twenty-three paper mills or plants connected with the manufacture of paper, situated chiefly in New York, Vermont, New Hampshire and Maine, and although about eighty-six per cent of the sales and contracts negotiated and made through its Boston office or for execution in Massachusetts require or contemplate the transportation and delivery of goods from a mill situated outside Massachusetts to purchasers in Massachusetts, or from its Massachusetts mill to purchasers outside Massachusetts, and only about fourteen per cent of such sales and contracts relate to goods to be delivered to a Massachusetts purchaser from its Massachusetts mill.

The statute does not deny to such a corporation equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States.

It is matter of common knowledge that there are in this Commonwealth many mills for the manufacture of paper, and, in the absence of evidence to the contrary, it will be assumed that such mills are salable in the market at fair prices.

The fact that a foreign corporation doing business in this Commonwealth acquired its real estate in Massachusetts while St. 1903, c. 437, § 75, was in force and before the enactment of St. 1907, c. 578, (now St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724,) does not show that such corporation has been denied the equal protection of the laws by being made subject to the excise imposed by the later statutes.

If the statute imposing an excise on foreign corporations doing business in Massachusetts discriminates in favor of the large and against the small corporations, one of the class of the large corporations cannot be heard to complain of this discrimination by which it is not aggrieved.

The objection, that the excise imposed on foreign corporations doing business here by St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724, is unconstitutional because it is unreasonable in amount, cannot be raised by a foreign corporation which is conducting here a purely local business that is distinct and separable from the interstate business conducted by it, and which is not a public service corporation directly engaged in interstate commerce, so that the corporation has the option of giving up the local commerce and business if it does not care to prosecute them under the excise imposed.

Assuming that it were open to the petitioner in the present case to contend that the excise imposed on it as a foreign corporation was invalid because unreasonable in amount, and assuming also that the point must be decided on the present record which did not disclose sufficient facts to determine whether the excise was excessive, it appearing that the petitioner had extraordinarily large financial resources and that the amount of the excise in question was $5,500, it was *said*, that the court "know of no principle of law which requires the conclusion that a license fee of that amount is unduly or unreasonably great, to a corporation of

such large capital as the petitioner, for the privilege of admission to the local markets of this Commonwealth for the transaction of an intrastate business in the manufacture and sale of an undisclosed quantity of paper of undisclosed value and out of which an undisclosed profit is realized."

PETITION, filed in the Supreme Judicial Court on July 20, 1915, under St. 1909, c. 490, Part III, § 70, and St. 1914, c. 724, by the International Paper Company, a corporation organized under the laws of the State of New York, to recover the amount of a tax or excise paid by the petitioner as a foreign corporation and alleged to have been imposed unlawfully.

The case was heard by *Loring*, J., upon an agreed statement of facts, of which the material parts are stated in the opinion. The petitioner asked the single justice to make the following rulings:

"1. As applied to the petitioner, the foreign corporation excise tax of Massachusetts, assessed and levied on it under St. 1909, c. 490, Part III, § 56, and St. 1914, c. 724, is unconstitutional and void, because it conflicts with the 'commerce' clause contained in § 8, art. 1, of the Constitution of the United States.

"2. As applied to the petitioner, the said excise tax is unconstitutional and void, because it is in contravention of the 'due process of law' clause contained in the Fourteenth Amendment to the Constitution of the United States.

"3. As applied to the petitioner, the said excise tax is unconstitutional and void, because it conflicts with the 'equal protection of the laws' clause contained in the Fourteenth Amendment to the Constitution of the United States.

"4. As applied to the petitioner, the said excise tax is unconstitutional and void under the principles set forth in the Western Union and Pullman decisions (216 U. S. 1, 56), which apply to business corporations engaged in interstate commerce, and are not confined, in their application, to *quasi* public corporations.

"5. The principles of the Western Union decisions (216 U. S. 1, 56) apply wherever, as here, the same instrumentalities and the same agencies carry on in the same places interstate commerce and domestic business in conjunction with each other.

"In an excise, measured, as here and in the Kansas tax, by the entire authorized capital, it is totally unnecessary to show that the domestic business is 'inextricably interwoven' with the interstate commerce transacted by the same instrumentalities, or to prove

that the interstate and intrastate business cannot be separated, or that they are carried on in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate commerce. Such factors did not appear in the Kansas tax.

"It suffices to show, as here, that the two classes of business, interstate and domestic, are carried on, in conjunction, by the same agencies and at the same places. If so, a tax of this description necessarily burdens to a substantial degree the interstate business of the company, as was held in the Western Union case.

"The Baltic decision (231 U. S. 68) only applies to cases where the local business is carried on wholly apart from the interstate commerce.

"6. If the local or domestic business is fairly incident to interstate commerce transacted here, which constitutes the great bulk of the total business, the said tax, imposed for the privilege of carrying on such local business, is unconstitutional under the 'commerce' clause.

"7. As applied to the petitioner, the amount of said excise is 'unduly great,' having reference to the real value of the local business and the property used therein, and is so 'disproportioned' to the volume and profits of the local business and to the value of the privilege taxed that it should be regarded as a mere 'device' to reach or burden the interstate portion of the company's commerce, property, and profits, and, consequently, is unconstitutional.

"8. If, as here, the petitioner is engaged in this State in the work of conducting some kind of interstate commerce, as their principal function, and in connection therewith, and by the same instrumentalities, a small percentage of local business, a tax measured by the entire capital, both interstate and domestic, is unconstitutional because its necessary effect is to burden directly and substantially the interstate portion of the company's capital, business, and property, and is, consequently, based on an unlawful measure, as was decided in the case of the Kansas tax in precisely the same terms as the statute of 1909 here involved (216 U. S. 1, 56).

"9. As applied to the petitioner, the said tax is unconstitutional, because it conflicts with the 'equal protection of the laws' clause

of the Fourteenth Amendment, under the principles of *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

"The said tax is unconstitutional, as applied to a company like this which acquired a large amount of permanent and valuable property in this State prior to St. 1907, c. 578, now St. 1909, c. 490, Part III, § 56, imposing the said tax and doubling the amount of the tax, as existing under preceding legislation, St. 1903, c. 437, § 75, under which the company had entered this State and acquired such property, and repealing the right theretofore enjoyed by foreign corporations to deduct from their excises the amounts paid for local property taxes, whereas at the time of imposing the said tax of 1907 no similar changes in taxation were made with reference to domestic corporations of the same kind carrying on a precisely similar business.

"10. The said tax, under said act of 1909, is also unequal and unconstitutional, under the 'equal protection of the laws' clause, because it charges, without discrimination, the same rate for the local privilege, without regard to whether the company's local business amounts to one per cent of ninety-nine per cent of its total sales or commerce here transacted, and because, further, the provision for a maximum of $2,000 unfairly and unequally discriminates against the smaller corporations, the corporation with $10,000,000 capital paying precisely the same as that with $100,000,000 capital, and paying nothing whatever on its capital in excess of $10,000,000.

"11. Although a tax otherwise lawful may, in some instances, be measured by capital or gross receipts, the Massachusetts excise uses an unlawful and unconstitutional measure, because, being measured by the entire capital stock, it necessarily affects directly and substantially that part of the capital employed in interstate commerce or outside of this State, as was held, as to the Kansas tax, in precisely the same terms as said statute of 1909 (216 U. S. 1, 56).

"12. St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724, as applied to the petitioner, is unconstitutional under the Massachusetts Constitution, because it exceeds the power of the Legislature to impose and levy 'reasonable' duties and excises, as limited by Part II, c. 1, § 1, art. 4 of the Constitution.

"The Massachusetts excise is wholly unreasonable.

"13. The petitioner, upon the agreed facts, is entitled to recover the tax paid by it."

The single justice refused to make any of these rulings and ordered that a decree be entered that the petition be dismissed. The petitioner alleged exceptions.

St. 1909, c. 490, Part III, § 56, is as follows: "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the Treasurer and Receiver General, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

St. 1914, c. 724, § 1, is as follows: "Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the Treasurer and Receiver General for the use of the Commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition."

C. A. Snow, for the petitioner.

W. H. Hitchcock, Assistant Attorney General, for the Commonwealth.

P. Ketchum, by leave of court, filed a brief as *amicus curiae*.

RUGG, C. J. This is a petition by a corporation organized under the laws of the State of New York to recover an excise tax paid by it, levied for the privilege of doing business in this Commonwealth, assessed to it under St. 1909, c. 490, Part III, § 56, and St. 1914, c. 724. The material facts are that the authorized capital stock of the petitioner is $45,000,000, of which between $39,000,000 and $40,000,000 has been issued and is outstanding. Its charter confers authority "to maintain, conduct and manage in the State of New York and elsewhere the business of manufacturing, producing, selling and dealing in any and all kinds of paper." It maintains and operates twenty-three paper mills or plants connected with the manufacture of paper, situated chiefly in New York, Vermont,

New Hampshire and Maine. At Montague in this Commonwealth it owns and operates a paper mill comprising real estate, water power, machinery and personal property, where is manufactured paper sold in Massachusetts and also in other States of this country. The petitioner maintains a selling office at Boston, with bookkeeping and clerical force, where sales and contracts for sale of paper for delivery both within and without this State are made by two salesmen subject to approval by employees of the petitioner at its main office in New York. About eighty-six per cent of the sales and contracts negotiated and made through its Boston office, or for execution in Massachusetts, require or contemplate the transportation and delivery of goods from a mill situated outside Massachusetts to purchasers in Massachusetts or from its Massachusetts mill to purchasers outside Massachusetts; and about fourteen per cent of such sales and contracts relate to goods to be delivered to a Massachusetts purchaser from its Massachusetts mill. No stock of goods is kept on hand in Massachusetts from which sales are made deliverable, the contracts being largely on long terms for the entire supply of paper required for newspapers, but the petitioner aims to have on hand at its mills and in transit ample stock to supply the needs of its customers.

Every question presented upon this record would be settled contrary to the contentions of the petitioner by *Keystone Watch Case Co.* v. *Commonwealth*, 212 Mass. 50, *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239, *Marconi Wireless Telegraph Co. of America* v. *Commonwealth*, 218 Mass. 558, and by *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, and *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 212 Mass. 35, both affirmed in 231 U. S. 68, except for the fact that a part of the excise tax here complained of was assessed under the provisions of St. 1914, c. 724, enacted since those decisions.

The constitutionality of that statute is assailed. Its crucial section is printed on page 106.

The foreign corporation tax law heretofore considered, St. 1909, c. 490, Part III, § 56, has exacted from every foreign corporation doing a domestic business within the Commonwealth an excise tax of one fiftieth of one per cent on the par value of its authorized capital stock, the maximum amount in no event to exceed $2,000 in any year. By the St. of 1914, c. 724 that maximum is removed

and an excise at a lower rate is imposed measured by the excess of authorized capital stock over $10,000,000.

The question is whether the removal of a maximum limitation of the excise and its measurement in part as to the corporations having an authorized capitalization in excess of $10,000,000 at a rate different from that applied to capitalization up to that sum destroy the validity of the excise.

The tax levied by said § 56 is strictly an excise and not a property tax, and does not violate any provision of the Constitution of Massachusetts or of the United States Constitution. That was decided by the decisions already cited. It was affirmed by the United States Supreme Court in 231 U. S. 68. Hence the general nature and purpose of our foreign corporation tax law is settled. It is not open to further discussion. That general nature and purpose does not appear to us to be changed by St. 1914, c. 724. The circumstance that by its terms the entire authorized capital is used for a measure of the excise is not fatal. That particular point as a federal question is foreclosed by binding decisions. It was said in *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania*, 125 U. S. 181, at page 186, that the State "could make the grant of the privilege [of doing intrastate business by a foreign corporation] conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation." The same point was decided in *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305. The statute there attacked as violative of the Federal Constitution imposed an excise measured by a percentage on its capital stock with modifications dependent upon dividends or want of dividends. It there was said, at page 315, "Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital;" and again, at page 317, "There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the State, according to the amount of its business or capital without the State. That is a matter, however, resting entirely in the control of the State, and not a matter of federal law, and with

which, of course, this court can in no way interfere. . . . It is said that against nearly all other foreign corporations, except this one, the taxes upon their franchises have been computed upon the basis of the capital employed within the State; but as to that we can only repeat what was said in the Court of Appeals of the State, that, if this be true, the defendant may have reason to complain of unjust discrimination and may properly appeal for relief to the Legislature of the State, but that it is not within the power of the court to grant any relief however great the hardship upon it. The extent of the tax is a matter purely of State regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable."

The words quoted from the two decisions of the United States Supreme Court last cited were not chance expressions used in the course of an argument by way of illustration, but were directed to the precise terms of statutes imposing an excise tax exacted as a condition to the doing of domestic business by a foreign corporation. *Cohens* v. *Virginia*, 6 Wheat. 264, at page 399. These expressions were used with deliberation in pronouncing important judgments, and formed essential links in the chain of reasoning by which conclusions were reached. In *Kansas City, Fort Scott & Memphis Railway* v. *Kansas*, 240 U. S. 227, this principle was reaffirmed. It was said at pages 232, 233, "The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power. Thus, in *Society for Savings* v. *Coite*, 6 Wall. 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested in Federal securities; and in *Home Ins. Co.* v. *New York*, 134 U. S. 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States' bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in *Flint* v. *Stone Tracy Co.* 220 U. S. 107, 165. It is also manifest that the

State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. *Delaware Railroad Tax*, 18 Wall. 206, 231, 232. *State Railroad Tax Cases*, 92 U. S. 575, 603. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, *supra* [122 U. S. 326]. *Ashley* v. *Ryan*, 153 U. S. 436. *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 559, 560. And, agreeably to the principle above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We recently have had occasion (*Baltic Mining Co.* v. *Massachusetts*, *supra* [231 U. S. 68]), to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts;' and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction." This principle is reiterated in effect in the latest authoritative decision of which we are aware touching this subject. In *Kansas City, Memphis & Birmingham Railroad* v. *Stiles*, 242 U. S. 111, the constitutionality of a statute was challenged, whereby an excise tax was levied on corporations measured by a percentage upon capital stock, property represented by which was situated in different States. It there was said, at pages 118, 119, "It is urged that this tax is void because it undertakes to tax property beyond the jurisdiction of the State, and imposes a direct burden upon interstate commerce. Objections of this character were so recently discussed, and the previous cases in this court considered, in *Kansas City, Fort Scott & Memphis Railway* v. *Kansas*, 240 U. S. 227, that it would be superfluous to undertake extended discussion of the subject now. In that case, after a full review of the previous decisions in this court, it was held that each case must depend upon its own circumstances, and that while the State could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented

property without the taxing power of the State. As to the objection based upon the due process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the State is in part measured by the capital stock representing property owned in other States."

The conclusion from these decisions seems indubitable that the use by a State of a percentage on the authorized capital stock of a foreign corporation as the measure of the excise tax or license fee imposed for permission to such foreign corporation to do an intrastate or local business within its borders is not a decisive element in determining the validity of such tax. There is nothing in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and the group of cases immediately following it in the same volume, and in *Atchison, Topeka & Santa Fe Railway* v. *O'Connor*, 223 U. S. 280, and *Oklahoma* v. *Wells, Fargo & Co.* 223 U. S. 298, which requires a different conclusion. Those decisions depend upon their facts, as do all other cases upon this branch of the law. They do not govern the case at bar. The words used in *Kansas City, Memphis & Birmingham Railroad* v. *Stiles*, 242 U. S. 111, at page 119, in distinguishing those cases, are equally applicable to the case at bar, namely, "The tax is not of the character condemned in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and kindred cases. In the latter case, a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing local business within the State. Under the circumstances therein disclosed and the character of the business involved, this court held that the statute was in substance an attempt to tax the right to do interstate business, and to tax property beyond the confines of the State, and was therefore void. . . . So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City, Fort Scott & Memphis Railway* v. *Kansas*, *supra*, is the nature and character of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character."

The tax imposed by St. 1914, c. 724, is strictly an excise and not a property tax for the reasons stated at length in *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, and *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 212 Mass. 35, which need not now be repeated. They apply with as much force to the instant statute as to the original foreign corporation tax statute there considered. The petitioner in the case at bar is carrying on a local business. Intrinsically that is a large business in itself. The manufacture of paper at Montague is purely a business within this Commonwealth. That is not commerce, although the goods produced there may become the subject of commerce. The distinction between commerce and manufacture is sharp and well defined. A substantial part of the commerce which follows as a consequence of manufacture conducted at the mill located within the Commonwealth is intrastate, consisting of sales and deliveries of paper to residents of the Commonwealth for use here. The local manufacture of paper is disconnected with the interstate business of the petitioner except as an artificial relation has been established by the petitioner. They have no inherent connection one with the other. *United States* v. *E. C. Knight Co.* 156 U. S. 1. *Kidd* v. *Pearson*, 128 U. S. 1, 20, 21, 22. *Cornell* v. *Coyne*, 192 U. S. 418, 428, 429. *Hopkins* v. *United States*, 171 U. S. 578, 594. *Keystone Watch Case Co.* v. *Commonwealth*, 212 Mass. 50. The petitioner has a mill within the State and a sales office within the State, where it makes sales of its goods manufactured at its domestic mill to purchasers domiciled within the State, to whom those goods are delivered by intrastate commerce. Here is a complete business cycle from raw material through manufacturing processes and sale to delivery to the customer entirely conducted within the State. The permission to conduct this business depends wholly upon the consent of this Commonwealth. That permission may be withheld utterly to foreign corporations. It may be granted upon any terms which do not violate the Constitution. This Commonwealth cannot interfere with interstate commerce or deprive the foreign corporation of its property without due process of law. But, as was said in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, at page 83, "A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure

of a tax of lawful authority within the State, has been sustained. *Maine* v. *Grand Trunk Railway*, 142 U. S. 217. *Provident Institution* v. *Massachusetts*, 6 Wall. 611. *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162–5. *United States Express Co.* v. *Minnesota*, [223 U. S. 335, 344.]" The foreign corporation tax law, having been upheld as constitutional in its application to facts not differing in any material respect from those here presented, it does not seem to us in the light of the decisions of the United States Supreme Court, to which reference has been made, to be transformed by St. 1914, c. 724, into an unconstitutional statute as applied to the facts now presented. It does not constitute an interference with or a burden upon interstate commerce. To the same effect in principle is *Crane Co.* v. *Looney*, 218 Fed. Rep. 260.

The statute does not deny equal protection of the laws to the petitioner. The laws of this Commonwealth have levied an excise tax both upon domestic and foreign corporations. But from the first until now there have been important differences of detail. The decisions heretofore cited all were made with reference to those differences and hence that factor alone is not of consequence. See also *St. Louis Southwestern Railway* v. *Arkansas*, 235 U. S. 350.

The petitioner contends that because it acquired its real estate in Massachusetts while the earlier law was in force, it is within the protection of *Southern Railway* v. *Greene*, 216 U. S. 400. The point of that case so far as it concerns the present facts is stated in the opinion in the Baltic Mining Company case, 231 U. S., at pages 87, 88, in these words: "In that case the railway company had gone into the State of Alabama and, under authority of the State, acquired a large amount of railroad property upon which it paid taxes as well as a license tax imposed by the State. After the payment of all such taxes and in this condition of affairs, the State undertook to levy upon the railroad company a privilege tax because it was a foreign corporation, not imposing the same tax upon domestic corporations doing precisely the same business. This court held that the railroad company was a person within the meaning of the Constitution and entitled to the equal protection of the laws and that by the taxation of its railroad property under such circumstances it was denied the equal protection of the law, no like tax being levied upon domestic corporations. It was said

in that case (page 416): 'We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business.' The conditions existing in *Southern Railway* v. *Greene* are not presented here." It seems to us that a like conclusion must follow in the case at bar. It is matter of common knowledge that there are many mills in this Commonwealth for the manufacture of paper. There is nothing to indicate that they are not salable in the market at fair prices, or that paper mill property differs in regard to availability for sale and valuable use from other kinds of manufacturing property. *White Co.* v. *Commonwealth*, 218 Mass. 558, 579-581.

Moreover, the contention of the petitioner upon this point, if sound, would prevent this Commonwealth from increasing the burden of the excise upon a foreign corporation once it had established itself here and acquired a permanent place of business. It was pointed out in *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 212 Mass. 35, 48, 49, that formerly the burden of taxation upon domestic was manifestly greater than upon foreign corporations. It is not certain that in general they may not still enjoy certain advantages over domestic corporations doing a like business. In the case at bar, it appears that the petitioner pays a lower rate upon its personal property located at its mill (because as a foreign corporation it is there taxed locally for its personal property) than a domestic corporation would pay on like personal property, so far as it contributes to that corporation's franchise value, because a domestic corporation is not taxable locally for such property, but it is taken into account in ascertaining the value of its franchise upon which it pays an excise tax. This arises from the fact that the local rate of taxation in Montague is less than the excise upon franchise value of domestic corporations. There is nothing upon this record to suggest that the excise tax law in its application to domestic and to foreign corporations is discriminatory against the latter. The two have stood side by side for many years in principle the same as now. It cannot be presumed in the absence of a definite showing of infraction of the Constitution that they cannot continue to be enforced. Without repeating what was

said in 212 Mass. 46, 49, and in *White Co.* v. *Commonwealth*, 218 Mass. 558, at pages 579, 580, it is enough to say that for the reasons there stated, in addition to those here appearing, the instant statute does not in its operation deny to the petitioner the equal protection of the laws nor establish any discrimination against it.

If, as the petitioner has argued, the statute discriminates in favor of the large and against the small corporations because of the smaller excise levied on corporations of over $10,000,000 capital, that is a matter which does the petitioner no harm and of which, therefore, it cannot complain. *McGlue* v. *County Commissioners*, 225 Mass. 59, and cases there collected. *Jeffrey Manuf. Co.* v. *Blagg*, 235 U. S. 571, 576. *Rail & River Coal Co.* v. *Ohio Industrial Commission*, 236 U. S. 338, 349.

It is contended that the excise is unreasonable in amount and is therefore unconstitutional. So far as this is a federal question it is concluded against the petitioner by the determination that it is conducting a purely local business as distinguished from an interstate business, and that, so far as it conducts both interstate and intrastate commerce, the two are distinct and separable. The petitioner is not a public service corporation directly engaged in interstate commerce for hire or otherwise, and it has the option of giving up the local commerce and business if it does not care to prosecute them under the excise imposed. "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce," and this is true even though the receipts from the local business do not equal the expenses chargeable against such receipts. *Pullman Co.* v. *Adams*, 189 U. S. 420, 422. *Allen* v. *Pullman's Palace Car Co.* 191 U. S. 171, 181, 182. *Illinois Central Railroad* v. *Mississippi Railroad Commission*, 229 Fed. Rep. 248, 255.

It is argued that the excise is "unduly great having reference to the real value" of the property of the petitioner within this Commonwealth, or to the amount of domestic business transacted here, and hence the statute must be unconstitutional under *Fargo* v. *Hart*, 193 U. S. 490, and *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 348. For the reason just stated, it does not seem to us that the point is open. It also appears not to be open because there is nothing to show the amount of the domestic business transacted by the petitioner within the Commonwealth. The

amount of its domestic business is stated only in percentages. The record is bare of anything from which can be calculated or inferred the actual amount of domestic business done here. The assessed valuation of its tangible property physically situated in Montague is given. It is required by law that that be assessed at its fair cash value. But neither its real value to the petitioner, its book value, its cost, nor its capitalized value are shown. It is said that not more than one and three fourths per cent in value of its total assets are in Massachusetts, and that its "total assets . . . amount in value to not less than $39,000,000 to $40,000,000;" but there is nothing to indicate how much greater than this figure the value of its assets may be. It seems to be manifest that there are not sufficient facts to determine whether the excise is excessive.

But, if it be assumed that that question is open to the petitioner and that it must be decided on this record, it cannot be said that the excise is excessive. The amount of the excise tax here in issue was $5,500. In itself that sum does not seem disproportionate. It is less than twice the fee annually charged in some cities in the Commonwealth for certain kinds of liquor licenses, where all the physical property engaged in the business also is subject to a property tax. The petitioner has extraordinarily large financial resources. It cannot be presumed that it may not be worth more to such a large corporation than it would be to a small one to be permitted to go into the local markets and compete for local business as a domestic manufacturer. We know of no principle of law which requires the conclusion that a license fee of that amount is unduly or unreasonably great, to a corporation of such large capital as the petitioner, for the privilege of admission to the local markets of this Commonwealth for the transaction of an intrastate business in the manufacture and sale of an undisclosed quantity of paper of undisclosed value and out of which an undisclosed profit is realized.

It does not appear needful to discuss in further detail the contentions put forward in behalf of the petitioner. The conclusion seems to us to follow from decisions heretofore made that the petitioner does not show that in any respect have its constitutional rights been infringed.

Petition dismissed with costs.

LOCOMOBILE COMPANY OF AMERICA *vs.* COMMONWEALTH.

Suffolk. March 29, 30, 1916. — September 13, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Tax, Excise imposed on foreign corporation doing business here. *Corporation*, Foreign: taxation.

A foreign corporation doing business in this Commonwealth and subject to the excise imposed by St. 1909, c. 490, Part III, § 56, after an increase of its authorized capital stock is not relieved from liability to pay a correspondingly larger excise by the fact that the proceeds of the additional stock issued by the corporation have been invested wholly in the extension and improvement of its manufacturing plant outside this Commonwealth. Following *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68.

PETITION, filed in the Supreme Judicial Court on November 10, 1910, under St. 1909, c. 490, Part III, § 70, by the Locomobile Company of America, a corporation organized under the laws of the State of West Virginia, having its factory in Bridgeport in the State of Connecticut, where it is engaged in the business of manufacturing and selling motor cars, and occupying in Boston under a lease a three story building used for an office, a salesroom and a repair shop for the purpose of repairing cars of its own make and second hand cars taken in exchange for those of its own make, to recover a tax or excise paid by the petitioner as a foreign corporation and alleged to have been imposed unlawfully.

The case was heard by *Loring*, J., upon an agreed statement of facts, sufficiently described in the opinion.

The petitioner asked the single justice to make the following rulings:

"1. As applied to the petitioner, the foreign corporation excise tax of Massachusetts, assessed and levied on it under St. 1909, c. 490, Part III, § 56, St. 1914, c. 724, is unconstitutional and void, because it conflicts with the 'commerce' clause contained in § 8 of art. 1 of the Constitution of the United States.

"2. As applied to the petitioner, the said excise tax is unconstitutional and void, because it is in contravention of the 'due

process of law' clause contained in the Fourteenth Amendment to the Constitution of the United States.

"3. As applied to the petitioner, the said excise tax is unconstitutional and void, because it conflicts with the 'equal protection of the laws' clause contained in the Fourteenth Amendment to the Constitution of the United States.

"4. As applied to the petitioner, the said excise tax is unconstitutional and void under the principles set forth in the Western Union and Pullman decisions (216 U. S. 1, 56), which apply to business corporations engaged in interstate commerce, and are not confined, in their application, to *quasi* public corporations.

"5. The principles of the Western Union decisions (216 U. S. 1, 56) apply wherever, as here, the same instrumentalities and the same agencies carry on in the same places interstate commerce and domestic business in conjunction with each other.

"In an excise, measured, as here and in the Kansas tax, by the entire authorized capital, it is totally unnecessary to show that the domestic business is 'inextricably interwoven' with the interstate commerce transacted by the same instrumentalities, or to prove that the interstate and intrastate business cannot be separated, or that they are carried on in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate commerce. Such factors did not appear in the Kansas tax.

"It suffices to show, as here, that the two classes of business, interstate and domestic, are carried on, in conjunction, by the same agencies and at the same places. If so, a tax of this description necessarily burdens to a substantial degree the interstate business of the company, as was held in the Western Union case.

"The Baltic decision (231 U. S. 68) only applies to cases where the local business is carried on wholly apart from the interstate commerce.

"6. If the local or domestic business is fairly incident to interstate commerce transacted here, which constitutes the great bulk of the total business, the said tax, imposed for the privilege of carrying on such local business, is unconstitutional under the 'commerce' clause.

"7. As applied to the petitioner, the amount of said excise is 'unduly great,' having reference to the real value of the local

business and the property used therein, and is so 'disproportioned' to the volume and profits of the local business and to the value of the privilege taxed that it should be regarded as a mere 'device' to reach or burden the interstate portion of the company's commerce, property, and profits, and, consequently, is unconstitutional.

"8. If, as here, the petitioner is engaged in this State in the work of conducting some kind of interstate commerce, as their principal function, and in connection therewith, and by the same instrumentalities, a small percentage of local business, a tax measured by the entire capital, both interstate and domestic, is unconstitutional because its necessary effect is to burden directly and substantially the interstate portion of the company's capital, business, and property, and is, consequently, based on an unlawful measure, as was decided in the case of the Kansas tax in precisely the same terms as the statute of 1909 here involved (216 U. S. 1, 56).

"9. As applied to the petitioner, the said tax under the said Act of 1914 is unconstitutional because it does not afford 'equal protection of the laws,' in that it arbitrarily and without reason classifies companies having less than $10,000,000 capital and those having in excess of that amount, and arbitrarily taxes the former class, consisting of the smaller corporations, at a rate twice as high as that imposed by reason of such excess on the larger and richer corporations, thereby unfairly and arbitrarily discriminating in favor of those best capable of standing the burdens of taxation.

"10. The said tax under said act of 1909 is also unequal and unconstitutional, under the 'equal protection of the laws' clause, because it charges, without discrimination, the same rate for the local privilege without regard to whether the company's local business amounts to one per cent or ninety-nine per cent of its total sales or commerce here transacted, and because, further, the provision for a maximum of $2,000 unfairly and unequally discriminates against the smaller corporations, the corporation with $10,000,000 capital paying precisely the same as that with $100,000,000 capital and paying nothing whatever on its capital in excess of $10,000,000.

"11. If, as in the case of the petitioner, the company receives as a part of the consideration for sale of new machines for delivery in this State from another State, old second hand machines and if its sales here made are confined to the resale of these second hand

machines and if it does no local business other than repairing machines sold in interstate commerce; and if, further, the abandonment of the privileges of reselling second hand machines or making such repairs would necessarily affect substantially the amount of sales made by the company for delivery from another State into this State, then the local business is fairly incident to its interstate commerce and the said excise is unconstitutional because it necessarily burdens the interstate commerce of the company. The said excise tax does not apply to such a company; and, if so applied, would be unconstitutional under the Federal Constitution.

"12. Although a tax otherwise lawful may, in some instances, be measured by capital or gross receipts, the Massachusetts excise uses an unlawful and unconstitutional measure, because, being measured by the entire capital stock, it necessarily affects directly and substantially that part of the capital employed in interstate commerce or outside of this State, as was held as to the Kansas tax in precisely the same terms as said act of 1909 (216 U. S. 1, 56).

"13. In the case of the petitioner, the increase of capital resulted in an increased tax of $300 per annum.

"If, as is shown, the increased capital was all invested outside of the State, resulting in an increase of interstate commerce, and no increase of domestic business whatever resulted in Massachusetts, it necessarily follows that the increase of the tax must have been paid out of the increase of interstate business and necessarily became a direct burden on interstate commerce or property outside of the State, in which Massachusetts has no interest, and the said excise is, therefore, unconstitutional.

"14. St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724, as applied to this petitioner is unconstitutional under the Massachusetts Constitution, because it exceeds the power of the Legislature to impose and levy 'reasonable' duties and excises, as limited by Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution.

"The Massachusetts excise is wholly unreasonable.

"15. The petitioner, upon the agreed facts, is entitled to recover the tax paid by it."

The single justice refused to make any of these rulings and ordered the entry of a decree dismissing the petition. The petitioner alleged exceptions.

C. A. Snow, for the petitioner.

W. H. Hitchcock, Assistant Attorney General, for the respondent.

P. Ketchum, by leave of court, filed a brief as *amicus curiae*.

RUGG, C. J. This is a petition for the recovery of the excise tax levied according to the terms of St. 1909, c. 490, Part III, §§ 56 *et seq* upon a foreign corporation for the privilege of conducting business within this Commonwealth. It was submitted to a single justice upon an agreed statement of facts in every respect the same as that agreed to in connection with the petition of the same petitioner considered and ordered dismissed in 218 Mass. 558, 573-575, 581, "except the amount of the authorized capital stock, the amount of the tax sought to be recovered and the figures indicating the amount of business in different respects done for the year in question." The facts need not be repeated here, as they are set forth in full in the report just cited. The only pertinent fact here disclosed and absent from the earlier case is that since that case arose and "In 1913 the company increased its authorized capital stock from $5,000,000 to $6,500,000, of which $6,250,000 has been paid in. This additional capital stock was used solely to extend and improve the company's manufacturing plant in Bridgeport, Connecticut, and to increase its business of manufacturing and selling automobiles to be delivered from that plant, as above described. No part thereof was used for the purpose of increasing the business of selling used cars or of making repairs, transacted as aforesaid at its Boston place of business." It was held in the earlier decision that the petitioner's manifestly domestic business of considerable proportions rendered the petitioner subject to the excise tax.

The circumstance that the tax now is somewhat larger because of an increase of capital stock invested wholly outside this Commonwealth is under all the circumstances an immaterial circumstance. The authorized amount of capital stock is not the same as its paid in capital and doubtless is different from its entire capital. As was said in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, at page 87, "the Massachusetts statute limits the tax to a maximum of $2,000. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the

tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

The case at bar seems to us to be governed by that decision. See also *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, and *S. S. White Dental Manuf. Co.* v. *Commonwealth*, 212 Mass. 35, both affirmed in 231 U. S. 68. *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239. The principles declared in *Locomobile Co. of America* v. *Commonwealth*, 218 Mass. 558, 573–575, 581, are decisive against every contention put forward by the petitioner. Those principles, so far as governed by the Constitution of the United States, appear to us to be in conformity to the decisions of the Supreme Court of the United States. *Kansas City, Fort Scott & Memphis Railway* v. *Kansas*, 240 U. S. 227, and cases there reviewed. *Kansas City, Memphis & Birmingham Railroad* v. *Stiles*, 242 U. S. 111.

Since no part of the excise here challenged was levied under the terms of St. 1914, c. 724, that statute need not be considered.

Petition dismissed with costs.

WALTER L. HAYES *vs.* PENN MUTUAL LIFE INSURANCE COMPANY & others.

Suffolk. November 20, 1916. — September 13, 1917.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Insurance, Life: endowment. *Equity Jurisdiction*, Mistake, To cancel instrument, Retention of bill. *Contract*, In writing, Rescission.

If an experienced business man makes an application in writing to a life insurance company for a "thirty year endowment policy" for the benefit of his wife, there is no ambiguity as to the kind of policy applied for, and the insurance company has no reason to suppose that the applicant intended to have the insurance money in case he lived beyond the thirty year period paid to himself instead of to his wife, and the insured, after the death of his wife before the expiration of the

endowment period, cannot maintain a suit in equity to change the binding force of the contract by reason of his own alleged undisclosed mistake in thinking that the policy made the insurance money payable to himself in case he should be living when the thirty year period expired.

In such a suit in equity brought by the insured to have the policy cancelled and the amount of the premiums repaid to him, where it appeared that the plaintiff's wife had lived during the first twenty-five years of the existence of the policy and during that time had enjoyed the benefit of the insurance on her husband's life under the policy, the plaintiff sought a return of the premiums, alleging that neither he nor his wife examined or read the policy at any time before her death and so failed to discover that the insurance money was payable to the wife or her representative at the maturity of the endowment period. *Held*, that the plaintiff and his wife, having accepted the policy, could not deprive the insurance company of its rights under it by neglecting to read it, and that it would be inequitable to compel the insurance company to return the premiums, for which it had given an equivalent by its liability on the life insurance, solely because the plaintiff did not take the trouble to read the policy to ascertain his rights under it until after his wife's death.

In the same case the bill sought as alternative relief to have the plaintiff given an equitable lien upon the insurance money to the extent of the premiums paid by him, and it was *held*, that, there being no ground for cancelling the policy, it should be paid in accordance with its terms, and that the insurance company should not be kept in court for the purpose of establishing on this bill a possible claim by the plaintiff against the representative of his deceased wife as the beneficiary of the policy — without intimating that such a claim existed.

BILL IN EQUITY, filed on February 12, 1916, and amended on November 21, 1916, as of March 4, 1916, by the insured under a policy of endowment life insurance, seeking the cancellation of the policy of insurance and a return of the premiums paid under it on the ground stated in the opinion, and seeking in the alternative the establishment of an equitable lien upon the insurance money for the amount of the premiums paid by the plaintiff. The amendment to the bill referred to above was by adding to it the following: "The defendant, Mary S. H. Rouse, is the only child of the plaintiff and of Fanny F. S. Hayes, and interested in the cause as sole heir at law and the residuary legatee under the will of said Fanny F. S. Hayes, deceased, the plaintiff's wife."

The defendants demurred to the bill as amended, and the case was heard upon the demurrers by *Carroll*, J., who overruled the demurrers, and, being of opinion that the interlocutory decree or order overruling the demurrers so affected the merits of the controversy that the matter ought, before further proceedings, to be determined by the full court, reported the question for such determination.

A. H. Brooks, for the defendant insurance company.

G. Hoague, for the defendant Mary S. H. Rouse.

H. R. Scott, for the plaintiff.

DE COURCY, J. The defendant insurance company, on December 4, 1886, issued a thirty year endowment policy of life insurance on the life of the plaintiff, by which it agreed to pay to Fanny F. S. Hayes, wife of the insured, her executors, administrators or assigns, the sum of $5,000 on the first day of December, 1916; or, if said Walter L. Hayes, the insured, should die before that time, then to make said payment to his said wife, her executors, administrators or assigns. The policy has remained in force by the payment of annual premiums alleged to have been made by or on behalf of the plaintiff. Fanny F. S. Hayes died on March 27, 1912. In March, 1914, the plaintiff brought a bill in equity alleging that it was his intention and that of the defendant insurance company to have the policy made payable to himself at the maturity of the endowment period, and payable to his wife only in the event of his death before that time; but that, by the mutual mistake both of himself and the company, the policy was made out in its present form, payable to his wife, both in the event of his death during the thirty years, and at the expiration of the endowment period; and he sought to have the policy reformed and made payable to him at the maturity of the endowment period. A trial was had before a single justice of this court, who found that the policy issued was exactly in accordance with the terms of the plaintiff's application, and that the insurance company made no mistake in issuing it in the present form, and the bill was dismissed. On appeal the decree was affirmed. *Hayes* v. *Penn Mutual Life Ins. Co.* 222 Mass. 382.

By the present suit the plaintiff seeks to have the policy cancelled and the premiums repaid to him, on the ground that he mistakenly understood that the policy was to be made payable to himself in the event that he lived to the end of the endowment period; and that as a result of this misunderstanding "there was no full and complete meeting of the minds of the parties and therefore no real contract between them." The plaintiff's written application called for a thirty year endowment policy, for the benefit of his wife. There was no uncertainty or ambiguity as to the kind of policy applied for. The insurance company had

no reason to suppose that the plaintiff, an experienced business man, meant by the word "endowment" something different from its ordinary recognized meaning in insurance contracts; and it issued the contract which the plaintiff apparently intended to have, as indicated by the language he used. If he misapprehended the meaning of the term "thirty year endowment" policy, the insurance company was not aware of it, and admittedly did not contribute to such mistake by any fraud or misrepresentation. The binding force of the contract cannot be affected by the alleged undisclosed mistake of the plaintiff. See *Boyden* v. *Hill*, 198 Mass. 477.

This thirty year endowment policy was issued in 1886. It was for the benefit of the plaintiff's wife. For more than twenty-five years annual premiums were paid, and the defendant company was liable to Mrs. Hayes in the event of the plaintiff's death during that period. Although Mrs. Hayes was protected by the policy during all those years, the plaintiff now seeks a return of the premiums, alleging that neither he nor his wife examined or read the policy at any time, and so failed to discover that the insurance money was payable to Mrs. Hayes or her representatives at the maturity of the endowment period. Having accepted the policy, they cannot deprive the insurance company of its rights thereunder by merely neglecting to read it. It would be inequitable now to compel the company to pay back the premiums for which it has given an equivalent as above stated, solely because the plaintiff did not take the trouble to read the policy and ascertain his rights under it until after his wife's death. *Johnson* v. *New York, New Haven, & Hartford Railroad*, 217 Mass. 203. *American Express Co.* v. *United States Horse Shoe Co.* 244 U. S. 58.

The bill seeks in the alternative to give the plaintiff an equitable lien upon the proceeds of the policy to the extent of the premiums paid by or for him. His bill, however, proceeds on the ground that no contract was made and hence that the policy should be cancelled. As under the allegations of the bill there is no ground for cancelling the policy it should be paid in accordance with its terms, and the insurance company should not be kept in court for the purpose of establishing on this bill a possible claim as between the plaintiff and his daughter Mrs. Rouse — without intimating that such a claim exists. It follows that the demurrers should be sustained, and it is

So ordered.

VIOLET I. TAYLOR *vs.* BARTON CHILD COMPANY.

Suffolk. November 23, 1916. — September 13, 1917.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Assignment. Bankruptcy, Rights of trustee. *Book Accounts.*

An assignment in writing under seal by a dealer in butter, eggs and similar products, as security for the payment of certain promissory notes of such dealer, of "all our book accounts which are now due or which may become due, at any time, until our seven promissory notes of even date . . . are paid as stipulated," passes no title or right as against the trustee in bankruptcy of the assignor to any account not in existence at the time of the assignment.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 2, 1914, by the assignee of Annie B. McCarthy against the Barton Child Company, a corporation, to enforce the pledge and transfer of the defendant's book accounts to said Annie B. McCarthy by an instrument under seal dated December 3, 1910.

The instrument sought to be enforced was as follows:

"Know all men by these presents that we, the Barton Child Company, a corporation duly organized by law and having its usual place of business in Boston, Massachusetts, in consideration of the sum of Five Thousand Dollars ($5000.00) to us paid by Annie B. McCarthy of Concord, Massachusetts, do hereby set over, transfer and assign to the said Annie B. McCarthy all our book accounts which are now due or which may become due, at any time, until our seven promissory notes of even date, to the said Annie B. McCarthy, are paid as stipulated in accordance with the contract between the said Barton Child Company and the said Annie B. McCarthy, which contract is dated December 3, 1910 and the terms of which are incorporated and made a part of this agreement. Said Annie B. McCarthy or her attorney, J. J. McCarthy, shall have the right at any time, during reasonable business hours, to examine the books of the said Barton Child Company; it being distinctly understood and agreed that the said

Annie B. McCarthy shall not record the within assignment, if said promissory notes are paid as stipulated.

"Witness our hands and seal this third day of December 1910.

Barton Child Company
Edward L. Child, Treas. [corporate seal]
Annie B. McCarthy [seal]"

The assignment under which the plaintiff sued was as follows:

"Know all men by these presents that I, Annie B. McCarthy of Watertown in the County of Middlesex and Commonwealth of Massachusetts, in consideration of one dollar and other valuable considerations to me paid by Violet I. Taylor of said Watertown, do hereby assign, transfer, set over and convey to the said Violet I. Taylor, all claims, demands, notes, mortgage and mortgage notes, certificates of stock and any and all securities which I have against the Barton Child Company, a Massachusetts corporation, Frank W. Barton, Edward L. Child and Charles A. Child as security for a loan by me to the Barton Child Company on which loan, the sum of Four Thousand Dollars ($4,000.00) is due me with interest.

"Witness my hand and seal this twenty-seventh day of December A.D. 1912.

Annie B. McCarthy [seal]"

On February 13, 1914, the defendant was adjudicated a bankrupt, and on November 10, 1914, Forrest F. Collier, the trustee in bankruptcy of the Barton Child Company, filed an answer to the bill, alleging, among other things, that as such trustee he was authorized to collect all the outstanding book accounts of the Barton Child Company and as such trustee had collected certain book accounts of that company, and denying that the plaintiff had any right or interest in any outstanding accounts of the Barton Child Company or was entitled to any relief prayed for in her bill.

The case was referred to a master, who filed a report stating his findings of fact, including those mentioned in the opinion, and reported that on these facts the parties had argued before him the following questions of law, which it was not within the master's province to deal with and which he had not attempted to decide:

"1. Whether the assignment is binding on the corporation.

"2. The validity of a general assignment of future book accounts.

"3. The construction of the language used in the assignment, the plaintiff claiming that it includes all book accounts thereafter contracted and the defendant claiming that it covers only such book accounts as were then in existence, some of which were then due and the balance of which would become due in a comparatively short space of time."

The case came on to be heard before *Pierce*, J., and, the exceptions of both parties to the master's report having been waived, the single justice reserved the case for determination by the full court as follows:

"The exceptions of both parties to the master's report having been waived, and the respondent Forrest F. Collier, as trustee in bankruptcy of the Barton Child Company, having waived his appeal from the interlocutory decree overruling his plea in bar to the jurisdiction of this court, at the request of the parties, I reserve this cause for the consideration and determination of the full court upon the bill of complaint, the answer and the amended answer of Forrest F. Collier as trustee in bankruptcy of the Barton Child Company, the replication to the answer and the amended answer, and the master's report.

"If the plaintiff is not entitled to maintain the within cause of action against Forrest F. Collier, trustee in bankruptcy of the Barton Child Company, defendant, a final decree dismissing the bill without costs is to be entered.

"If, however, the plaintiff is entitled to maintain the within cause of action against said Forrest F. Collier as trustee in bankruptcy of the Barton Child Company and if the plaintiff is entitled to obtain from said Collier as such trustee the book accounts of the Barton Child Company which were acquired after December 3, 1910, as security to satisfy the balance of the loan made to said Barton Child Company, then a final decree in favor of the plaintiff shall be entered against said Collier as such trustee in the sum of $1,850 without costs."

Jere J. McCarthy, for the plaintiff.

F. F. Collier, for the defendant.

RUGG, C. J. This is a suit in equity to enforce the rights of the plaintiff under an assignment of book accounts made to her

assignor by the defendant corporation as security for a loan. It is undisputed that on December 3, 1910, one McCarthy, who is the assignor of the plaintiff, lent to the defendant $5,000 and received its seven notes with different due dates, the most remote being June 3, 1913. As security for and in consideration of the loan, on the same day the defendant executed and delivered to the plaintiff's assignor an instrument which, it is contended, was an assignment of its present and future book accounts. Some of the notes were extended, some have been paid, and a balance remains unpaid. This bill was filed on February 2, 1914. An injunction respecting the book accounts was issued on February 13, 1914. The defendant was adjudicated a bankrupt on February 13, 1914. Its trustee in bankruptcy is defending this case.

At the time of the loan the defendant was engaged in dealing at wholesale in butter, eggs and similar products. It needed the money borrowed from the plaintiff's assignor for carrying on its business and used it for that purpose. The book accounts at the time of the assignment were between $25,000 and $30,000, some of which were due; but the greater part of them would become due within the next sixty days.

The crucial question is whether the assignment of book accounts, which are to come into existence in the future in connection with an established business, will be enforced in equity against a trustee in bankruptcy.

It is a well recognized principle of the common law that a man cannot sell or mortgage property which he does not possess and to which he has no title. The vendor must have a vested right in personal property in order to be able to make a sale of it. "A man cannot grant or charge that which he hath not." *Jones* v. *Richardson*, 10 Met. 481, 488. *Moody* v. *Wright*, 13 Met. 17. *Leverett* v. *Barnwell*, 214 Mass. 105, 109.

The ground of our decisions may be stated shortly. There can be no present conveyance or transfer of property not in existence, or of property not in the possession of the seller to which he has no title. A sale of personal chattels is not good against creditors unless there has been a delivery. Manifestly there can be no delivery of chattels not in existence. In order that after acquired chattels may be brought under the lien of a mortgage, or of hypothecation, there must be some act of the parties subsequent

to the time when such chattels come into existence and into the ownership and possession of the mortgagor. The mortgage is held not to have the effect of changing the title to after acquired chattels without some further act of the parties.

There is an exception at the common law to the effect that one may sell that in which he has a potential title although not present actual possession. The present owner might sell the wool to be grown upon his flock, the crop to be harvested from his field or the young to be born of his herd, or assign the wages to be earned under existing employment. *Kerr* v. *Crane*, 212 Mass. 224, 229. *St. Johns* v. *Charles*, 105 Mass. 262. *Farrar* v. *Smith*, 64 Maine, 74, 77. *M'Carty* v. *Blevins*, 5 Yerger, 195. *Dugas* v. *Lawrence*, 19 Ga. 557. But see now sales act, St. 1908, c. 237, § 5 (3). That principle of the common law has never been carried so far as to include the case at bar. The catch of fish expected to be made upon a voyage about to begin cannot be sold. *Low* v. *Pew*, 108 Mass. 347. There can be no sale of the wool of sheep, the crop of a field or the increase of herds not owned but to be bought, and there can be no assignment of wages to be earned under a contract of employment to be made in the future. *Eagan* v. *Luby*, 133 Mass. 543. *Citizens Loan Association* v. *Boston & Maine Railroad*, 196 Mass. 528, 531. See St. 1906, c. 390, § 4; St. 1916, c. 208, § 2.

It is also the established doctrine in this Commonwealth that a mortgage of future acquired property will not be enforced in equity before actual possession taken by the mortgagee as against persons subsequently acquiring an interest therein for value and having possession. That has long been settled here, although the contrary rule prevails more widely. *Federal Trust Co.* v. *Bristol County Street Railway*, 222 Mass. 35, 45, 46, where cases are collected. It would be anomalous for a court governed by these principles as to sales and mortgages of future acquired goods and chattels to hold that there could be an assignment of future acquired book accounts valid and enforceable under circumstances where a like attempt to hypothecate future acquired chattels would be held unenforceable.

A book account is a chose in action. It is "a right not reduced into possession" which "can only be reduced into beneficial possession by an action or suit." *Haskell* v. *Blair*, 3 Cush. 534, 535. It is property. While some of its incidents differ from those of a

tangible thing, these are not sufficient to warrant the application to it of principles of law different in the respect here involved from those governing transactions concerning property with a physical and tactile body. Where it is reasonably practicable, it is desirable in the development of an harmonious system of jurisprudence that the same general rules of law should be applicable to the same classes of facts and that exceptions having their foundation more upon appearances than upon differences of substance should not be multiplied.

Practical difficulties of no small consequence would be encountered in the operation of the contrary doctrine. Assignments of book accounts do not require recording or any public act for their validity. *Marsh* v. *Woodbury*, 1 Met. 436. *William Gilligan Co.* v. *Casey*, 205 Mass. 26. Notice need not be given in order that they be valid against third persons. *Thayer* v. *Daniels*, 113 Mass. 129. *Cropper* v. *Gorham*, 221 Mass. 119, 125. Merchants and manufacturers well might acquire a considerable credit upon the supposed strength of book accounts which later might turn out to have been assigned long before they came into existence. A door would be opened for the accomplishment of fraud in business.

There are decisions by the courts of other jurisdictions where a contrary result has been reached. *Union Trust Co.* v. *Bulkeley*, 80 C. C. A. 328. *In re Macauley*, 158 Fed. Rep. 322. *Tailby* v. *Official Receiver*, 13 App. Cas. 523. These decisions follow naturally from *Holroyd* v. *Marshall*, 10 H. L. Cas. 191, *Central Trust Co.* v. *Kneeland*, 138 U. S. 414, 419, and other cases holding that mortgages of future acquired personal property are enforceable in equity. But as has been pointed out, that is not the law of this Commonwealth.

The principles and spirit of our jurisprudence have been that owners of personal property ought not to acquire any false credit by creating incumbrances more or less secret and unknown to the world upon property of which they are to come into possession in the future as ostensible owners in absolute right. *Blanchard* v. *Cooke*, 144 Mass. 207, 223, 227. *Wasserman* v. *McDonnell*, 190 Mass. 326. *Schlatter* v. *Young*, 197 Mass. 36, 38. *Chick* v. *Nute*, 176 Mass. 57. *Wilson* v. *Russell*, 136 Mass. 211. *Harriman* v. *Woburn Electric Light Co.* 163 Mass. 85.

It was held in *Hall* v. *Jackson*, 20 Pick. 194, that an irrevocable

power of attorney to bankers to collect debts due to a manufacturer from his customers as security for advances made by the bankers did not constitute a lien superior to an attachment by trustee process, in the absence of possession, control or disposing power in the person claiming the lien over the subject matter in which the lien was claimed. See, also, *Elmore* v. *Symonds*, 183 Mass. 321.

In the light of these decisions it would be illogical and discordant with the policy of our law to uphold the assignment in the case at bar. It was held in *Purcell* v. *Mather*, 35 Ala. 570, *Skipper* v. *Stokes*, 42 Ala. 255, *Clanton Bank* v. *Robinson*, 195 Ala. 194, that assignments similar to those here in question were invalid.

In accordance with the terms of the reservation let the entry be

Bill dismissed without costs.

WINONA A. VANNAH *vs.* HART PRIVATE HOSPITAL.

Suffolk. January 8, 1917. — September 13, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CARROLL, JJ.

Actionable Tort, Founded on breach of contract. *Contract*, Implied in fact. *Hospital*, Private: contract to protect patient while helpless.

Where a corporation conducting a private hospital agrees, for a stipulated pecuniary compensation, with a woman patient, who is about to have an operation performed there by her own surgeon after being etherized by her family physician, that it will give her a room in its hospital before and after the operation, that it will allow her surgeon and her family physician to use its operating room and that it also will give her the services of such nurses as may be necessary for her care before, after and during the operation, if, after the operation is performed and while the patient still is unconscious under the influence of ether, one of the two hospital nurses, who were present during the operation and assisted in carrying her to her room, forcibly pulls off a valuable ring from the patient's finger and steals it, this is a violation by the corporation of its duty to the patient under its contract, for which the patient may hold it liable in an action of tort. Following the principle of *Bryant* v. *Rich*, 106 Mass. 180.

If the plaintiff in the case described above when received into the hospital had been asked to put all her "valuables" into the custody of the hospital and had failed to comply with the request in regard to her rings, this would have been a defence to the action, because then the duty owed by the corporation under its contract would not have extended to the care of the rings on the patient's fingers.

If, however, the plaintiff merely was asked to put her money into the custody of the hospital but was not asked to put anything else into its custody, the defence would not be made out.

TORT, originally with a single count as follows: "And now comes the plaintiff in the above entitled cause and says that the defendant is a corporation operating a private hospital in that part of Boston called Roxbury and that on the twenty-fourth day of December nineteen hundred and eleven the plaintiff was etherized in the operating room of the defendant and that the charge for operating expenses included the proper guarding of the plaintiff's person while under the ether from any unwarrantable interference and this duty was so negligently performed that the plaintiff suffered great damage to wit: the loss of a diamond ring from her finger." Writ in the Municipal Court of the City of Boston dated January 31, 1912.

The case was removed to the Superior Court and on November 24, 1913, the plaintiff was allowed to amend her declaration by adding a second count as follows: "Second count: And now comes the plaintiff and says that the defendant is a corporation operating a private hospital for hire in that part of Boston known as Roxbury, in which the defendant was accustomed and undertook to provide the necessary care, attention, operating room and attendance of nurses for persons who wished to go there for medical or surgical treatment and who were ready and willing to pay for the same; that on or about the twenty-fourth day of December, 1911, the plaintiff was an inmate of the said hospital, paying a valuable consideration for board, room, nurses, use of operating room, attendance, and all necessary care incident to an operation to be performed on the plaintiff in said hospital, partly under the care of the said defendant and its nurses while in the operating room of said hospital and wholly under the care of the said defendant and its nurses outside of the operating room; that during the operation and for some time thereafter the said plaintiff was under the influence of ether; that at the said time the plaintiff possessed and wore on the ring finger of her left hand a valuable diamond ring; that the said ring was lost, stolen or in some way was removed or disappeared from the finger of the said plaintiff while the said plaintiff was under the care of the said defendant, its servants and agents; that the said disappearance or loss of the ring was due to the negligence of the defendant, its servants or agents or to the illegal acts of commission of the servants or agents of the defendant. And the plaintiff further says that in all the premises she was in the exercise of due care."

The case was tried before *Morton*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the plaintiff asked the judge to make, among others, the following rulings:

"1. The defendant being a corporation can act only through its officers, agents or servants; and therefore the defendant is liable for a theft committed by its agents or servants, while acting within the scope of their employment, precisely the same as though the theft had been committed by the defendant itself, provided you find that a theft was committed."

"5. Both the hospital and nurses were in the general control of the defendant, and, during the time that the plaintiff remained in the operating room, the nurses who assisted at the operation remained in the general control of defendant who paid them for their services, and subject to its orders and, therefore, as matter of law, they were not, for the time being, the servants of the operating physicians, but they were merely subject to their directions as to details, and therefore the defendant might be found liable for a theft committed by the nurses while the plaintiff was in the operating room, provided you find that a theft was in fact committed."

"11. Before the plaintiff was etherized the ring had been in the personal possession of the plaintiff and under her immediate care. After she was etherized a change was thereby made in the actual physical situation. After the plaintiff was etherized the ring was in the personal possession of the defendant and under its immediate care acting through its nurses. From the nature of the transaction, since the plaintiff had lost the use of her senses, the plaintiff had ceased to be in charge of the ring and the defendant had as matter of law assumed the entire charge of the ring as well as the plaintiff's body and the clothing, if any, which covered her body.

"12. The general control of the hospital was in the defendant. By the nature of the contract between the plaintiff and the defendant the custody of the plaintiff's wearing apparel and adornments of the person must have been in the defendant when the plaintiff was under the influence of ether, and the consideration paid ought, as a matter of business, to secure some protection to the plaintiff where the condition of being under the influence of ether, to which

she was expected to conform, put it out of her own power to look after her effects herself."

The judge refused to make any of these rulings, and submitted the case to the jury with the instructions described in the opinion. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. J. O'Hare, for the plaintiff, submitted a brief.

J. F. Warren, for the defendant.

LORING, J. The defendant operates a private hospital for gain. The plaintiff went there to undergo an operation. She testified that "her physician made the arrangements for [her] entering into the hospital. . . . That she paid to the hospital $15 a week for attendance and $10 for the use of the operating room." The operation was performed by a surgeon not connected with the defendant hospital. The plaintiff was etherized by her family physician and he was not connected with the defendant. In addition to the surgeon and the family physician two of the defendant's nurses were present at the operation. When the plaintiff was on the operating table before she went under ether she had two rings on her hands. After the operation and while the plaintiff was still under the effects of ether she was carried from the operating room to her own room in the hospital by "one of the doctors assisted by the nurses." When the plaintiff came out of the ether she noticed that the more valuable of the two rings (a ring which "would not come off without assistance") was missing. At the trial the plaintiff put the surgeon and the family physician on the witness stand. Each of them testified that he did not take the ring. The defendant put on the stand the superintendent of the hospital, one of the two operating nurses and the plaintiff's day nurse. Each of them testified that she did not take the ring. The operating nurse who was put upon the witness stand testified that the other operating nurse was in California "the last time she heard from" her. The plaintiff made many requests for rulings and now insists upon the first, fifth, eleventh and twelfth set forth above. These were refused and an exception taken. The judge instructed the jury that to recover the plaintiff must prove that she was in the exercise of due care and that the defendant was negligent. An exception was taken to this ruling. The case is here on these exceptions.

On the evidence the jury were warranted in finding that the ring was forcibly removed from the plaintiff's hand by the operating nurse who when last heard from was in California.

If the absent nurse did steal the ring it is plain that the defendant is not liable on the ground that in stealing the ring the nurse was acting within the scope of her employment as a servant of the defendant. The first request for ruling therefore was properly refused.

If the plaintiff had stood in the relation of a stranger to the defendant there would have been no error in the trial. But the plaintiff did not stand to the defendant in the relation of a stranger. It is apparent from the bill of exceptions that the case was not tried on the footing that the rights of the plaintiff in this action depended upon the contract made by her with the defendant. For this reason the terms of this contract do not appear as fully as they otherwise would have done. But from what does appear in the bill of exceptions the presiding judge was wrong in telling the jury that the defendant's liability depended upon the plaintiff proving that it was negligent.

Under the contract entered into by the defendant corporation it was its duty not only (1) to give the plaintiff a room in the hospital before and after the operation and (2) to give her surgeon and family physician the use of the operating room for the operation, but also (3) to give to the plaintiff the services of such nurses as were necessary for her care before, after and during the operation. It expressly appeared at the trial that "she [the plaintiff] paid to the hospital $15 a week for attendance." The services of the nurses which under the contract the defendant was bound to furnish the plaintiff included the services of nurses while she was unconscious from the effects of the ether, a condition which was a necessary part of the operation. And the question we have to decide is whether there was a violation of duty on the part of the defendant under this contract if the operating nurse in question stole the ring by forcibly pulling it off the plaintiff's finger while she was under the effects of ether, or whether on the facts appearing at the trial the jury could have so found. We are of opinion that the jury could have so found.

If for example a stranger had burst into the operating room, attacked the plaintiff and done her bodily harm or had attacked

the plaintiff while the nurses were carrying her from the operating room to her own room and the defendant's nurses had stood by and done nothing to protect the plaintiff from those attacks, it is plain in our opinion that there would have been a violation of the duty owed by the defendant under its contract with the plaintiff. It is equally plain in our opinion that the duty owed by the defendant under its contract with the plaintiff extended to the care of the rings on her fingers while she was unconscious from the effects of ether as well as to the security of her person. And finally it is equally plain in our opinion that there is as much a violation of the duty owed by the defendant under the contract where the attack upon the person or larceny of the ring is committed by one of the defendant's own nurses (whose duty it was to protect the plaintiff) as well as in the case where the attack is made by a stranger and the nurses do not undertake to protect her from the attack.

In its legal aspects the case is governed by the decision in *Bryant* v. *Rich*, 106 Mass. 180. In that case a dispute arose between a passenger on one of the defendant's steamers and one of the defendant's waiters as to whether the passenger had paid for his supper. The plaintiff, a cousin of the passenger in question, made a suggestion to which no exception could have been taken. Whereupon not only the waiter in question but the head steward and the other waiters knocked down the plaintiff and beat him. It was for this assault and battery that the action in *Bryant* v. *Rich* was brought. The presiding judge ruled (in accordance with a request made by the defendant) that "there is no evidence that the steward and waiters, in assaulting the plaintiff, were acting within the scope of any authority, or in the discharge of any duty, imposed upon them by the defendants." But in spite of this he instructed the jury that the plaintiff was entitled to recover. This ruling was sustained on the ground that as matter of contract the plaintiff as a passenger had the right to receive proper treatment from the defendants and their servants and all of them. This decision has been followed in other cases of carriers of passengers. *Hayne* v. *Union Street Railway*, 189 Mass. 551. *Jackson* v. *Old Colony Street Railway*, 206 Mass. 477. *Gentile* v. *Boston Elevated Railway*, 217 Mass. 113. In *Levins* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 175, it was held that a case was

not made out under this rule where a purse had been accidentally left on the window sill of the wash room of a car of the defendant company. In *Fairbanks* v. *Boston Storage Warehouse Co.* 189 Mass. 419, it was held that it did not apply where an assault was made by an attendant who under the rules of the defendant company accompanied the plaintiff when he went to examine goods stored by him in the warehouse of the defendant. The reason why the rule of *Bryant* v. *Rich* did not apply in the case of *Fairbanks* v. *Boston Storage Warehouse Co.* was because of the fact that the employee who made the assault was in attendance upon the plaintiff at the time in question for the plaintiff's own purposes. He was not a servant of the defendant to whose services the plaintiff was entitled under his contract with the defendant.

The decision in *Bryant* v. *Rich* does not depend upon the fact that the defendants in that case were common carriers. The decision would have been the same had the assault and battery occurred on an excursion steamer in place of upon a steamer operated by a common carrier. And the decision would have been the same if the steward and waiters had stolen rings from Bryant's fingers in place of knocking him down as they did. The doctrine of *Bryant* v. *Rich* applies whenever there is a contract between the plaintiff and defendant by force of which the defendant is to furnish for the plaintiff's comfort the services of its, the defendant's, employees. Where the injury to the plaintiff is caused by an act of the defendant's servants done in the course of their employment an action may be brought based on negligence of the defendant's servants for which the defendant is liable because the act took place in the course of his servants' employment, or an action may be brought in that case based on violation of the duty owed by the defendant to the plaintiff under the contract between the defendant and the plaintiff. But where (as was the case in *Bryant* v. *Rich* and in the case at bar) the injury done the plaintiff is caused by an act of the defendant's servants outside of the servants' duty as employees of the defendant but by an act of the defendant's servants which while not in the course of the servants' employment is none the less a violation of the duty owed by the defendant under the defendant's contract with the plaintiff, the only action that can be brought is an action founded upon the duty arising out of the contract.

The second count sufficiently sets forth a liability on the part of the defendant for violation of its duty under its contract with the plaintiff. It was held in *Bryant* v. *Rich* that "for a violation of such a contract either by force or negligence, the plaintiff may bring an action of tort, or an action of contract."

What has been said leaves open the defence which arises out of the testimony that the plaintiff when received into the hospital was asked to put into the custody of the defendant corporation all her "valuables." The defendant's agent who received the plaintiff when she came to the hospital testified that that request was made to her at that time. The plaintiff on the other hand testified that she was asked to put her money into the custody of the hospital but that she was not asked to put anything else into its custody. If the defendant's evidence is believed, a defence is made out. On the other hand if the plaintiff's evidence on this matter is believed, her rights depend upon the rule of *Bryant* v. *Rich*, *ubi supra*.

Exceptions sustained.

CHARLES E. SHERMAN *vs.* MABEL W. BUFFINTON.

Barnstable. January 9, 1917. — September 13, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CARROLL, JJ.

Contract, Rescission, Performance and breach.

In an action by a mason on an account annexed for work and materials furnished for a cottage of the defendant, it appeared that there had been a special contract between the parties for doing certain mason's work at the cottage for an entire price and that this contract required the building of twenty-five concrete piers, concrete basement walls and a chimney with a fireplace of West Barnstable brick, which was brick of a well known quality. This contract afterwards was modified by the substitution of tapestry brick for West Barnstable brick in the fireplace. An auditor found that this was such a radical departure from the original contract as to amount to a revocation of it. *Held*, that this finding was warranted and that the plaintiff might recover on a *quantum meruit*.

In the case above described it appeared that in laying the tapestry brick and building the fireplace the plaintiff followed the personal directions of the defendant and that he used ordinary skill. It further appeared that the fireplace when finished was not a good fireplace and was not constructed in a "workmanlike manner," but that this result was due to the failure of the defendant to furnish the plaintiff with adequate plans and necessary materials. *Held*, that the plaintiff

was not responsible for these defects and, in spite of them, might recover the value of the work and materials furnished.

In the same case it appeared that the plaintiff instead of building the basement walls of concrete, as had been required by an unchanged part of the original contract, built these walls of artificial concrete or cement blocks laid in lime mortar, and that in consequence the walls as constructed were not impervious to water, as they should have been. The auditor found that it would cost $20 to make the walls built equal to those agreed upon and required. On the evidence presented the only way to determine the amount of the deduction from his claim which the plaintiff ought to sustain by reason of his failure to follow the defendant's direction in this respect was to deduct $20 from the total fair value of the work and materials furnished. The judge who heard the case did this. *Held*, that this was right.

CONTRACT for $216.22 on an account annexed as described in the opinion. Writ dated July 6, 1914.

The case was referred to an auditor under a stipulation "that the findings of the auditor on all questions of fact shall be final." The auditor's report was recommitted to him and he filed a supplemental report. Thereafter the plaintiff moved for judgment on the auditor's reports and the defendant moved to recommit the auditor's report and his supplemental report.

These motions were heard by *Jenney*, J. He denied the motion to recommit the reports and granted the plaintiff's motion for the entry of judgment. He ordered that judgment be entered for the plaintiff in the sum of $196.22 with interest from the date of the writ. From the judgment entered in pursuance of this order the defendant appealed.

J. A. Kerns, for the defendant.

J. F. Volk, for the plaintiff.

RUGG, C. J. This is an action at law upon an account annexed. The case was heard by an auditor upon a stipulation that his findings of facts should be final. The auditor's report shows that a special contract was made for doing certain masonry work at the cottage of the defendant for an entire price. The contract required the building of twenty-five concrete piers, concrete basement walls, and a chimney with a fireplace of a well known quality of brick, called West Barnstable brick. This contract subsequently was modified by the substitution of tapestry brick for West Barnstable brick in the fireplace. This was found by the auditor to be such a radical departure from the original contract as to amount to a revocation of it.

There is no error of law in this finding. It is warranted by the subsidiary facts set forth.

The special contract having been revoked, the rights of the parties depend upon the implied obligation raised by law out of their relations. That obligation on the part of the plaintiff was to furnish appropriate material, so far as he furnished material, and to do his work according to the directions of the defendant or her agent in a workmanlike manner so far as possible under those directions. The obligation of the defendant was to pay for work thus performed and such material furnished what they fairly were worth.

It has been found that in laying the tapestry brick and in building the fireplace the plaintiff followed the personal directions of the defendant and that he used ordinary skill. The fireplace as finished was not a good fireplace and was not constructed in a "workmanlike manner." This result, however, was not due to any fault of the plaintiff, but was due to failure of the defendant to furnish an adequate plan for laying the tapestry brick, to provide a schedule of numbers for the tapestry brick so that they might be laid in such juxtaposition that their colors would blend, to her want of expertness in giving directions as to their laying, and to her failure to furnish firebrick and a sufficient quantity of properly colored mortar.

These findings demonstrate that in the finished work in this respect the plaintiff is in no wise responsible for defects, but that the defects followed as a direct consequence from the failures of the defendant in particulars where she assumed the responsibility.

It was a part of the original contract that the plaintiff should build the basement walls of concrete. As there was no change in this particular made or consented to by the defendant, the plaintiff continued at all times bound to do that work in that way, in order to conform to the directions of the defendant. He did not do this work as thus required, but instead built the basement walls of artificial concrete, or cement blocks laid in lime mortar. A concrete wall such as he was required to build would have been impervious to water, but the wall in fact was not impervious to water. The reason for making this change was that the plaintiff experienced some difficulty in setting forms for building a concrete wall and he thought the cement blocks would be

satisfactory to the defendant. The plaintiff consulted about this with Bradford, a carpenter who in general in behalf of the defendant was supervising the plaintiff's work. But she never authorized nor ratified this change. The auditor found that it would cost $20 to make the wall built equal to the wall agreed upon and required. The only way to determine the deduction which the plaintiff ought to sustain by his failure to follow the defendant's direction in this respect is to deduct $20 from the total fair value of the materials furnished and labor performed by him, because there was no evidence whereby the auditor could apply separate items for labor and materials to the walls or piers or fireplace and chimney. That was done by the Superior Court judge.

Judgment affirmed.

WILLIAM T. HOLLAND *vs.* FREDERICK W. ZEUNER.

Suffolk. January 9, 1917. — September 13, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CARROLL, JJ.

Workmen's Compensation Act. Physicians and Surgeons.

The provision of the workmen's compensation act in St. 1911, c. 751, Part III, § 13, as amended by St. 1914, c. 708, § 12, that the charges of physicians "for services under this act shall be subject to the approval of the Industrial Accident Board," refers only to the services for which under St. 1911, c. 751, Part II, § 5, the insurer is liable, and a physician's bill for services rendered more than two weeks after the injury, for which the employee is liable and the insurer is not, does not require the approval of the Industrial Accident Board, although the services were rendered in treating the employee for the consequences of the injury for which he was awarded compensation under the act.

CONTRACT by a physician on an account annexed to recover $59 for professional services. Writ in the Municipal Court of the City of Boston dated April 6, 1915.

The defendant's answer as amended alleged "that the fees for which the plaintiff brings this action are subject to the approval of the Industrial Accident Board and that such fees have never been approved by said board."

The Municipal Court found for the plaintiff, and, at the request

of the defendant reported the case to the Appellate Division. The Appellate Division made an order that the report be dismissed; and the defendant appealed.

R. H. Smith, for the defendant.

L. Makepeace, for the plaintiff, submitted a brief.

RUGG, C. J. This is an action whereby the plaintiff seeks to recover for professional services rendered by him as physician to the defendant. The defendant received injuries arising out of and in the course of his employment by a subscriber under the workmen's compensation act. His injury was reported to the Industrial Accident Board by his employer. He was referred to an impartial physician, upon whose report an agreement for compensation was made and allowed. The plaintiff attended the defendant from the time of the injury until recovery. He has been paid by the insurer for his services rendered during the first two weeks after the injury. The balance of his bill is here involved. The defendant contends that there can be no recovery because the bill has not been approved by the Industrial Accident Board.

It is provided by the workmen's compensation act, St. 1911, c. 751, Part III, § 13, as amended by St. 1914, c. 708, § 12, that "Fees of attorneys and physicians and charges of hospitals for services under this act shall be subject to the approval of the Industrial Accident Board. If the association and any physician or hospital, or the employee and any attorney, fail to reach an agreement as to the amount to be paid for such services, either party may notify the board, which may thereupon call for the formation of a committee of arbitration in accordance with the provisions of this act, and all proceedings thereunder shall be in accordance with the provisions of this act." It is manifest from this section as a whole that it does not cover fees for services which are rendered outside the act. The second sentence makes it plain that the fees of the physician which are "under this act" are those for which the insurer must pay. It is only in the case of a disagreement between the insurer and the physician that that board is to be notified and the disagreement settled. The employee is not mentioned at all in this connection. The only disagreement in connection with which he is mentioned is one with his attorney. So far as concerns physicians, this section refers only to the services for which, under Part II, § 5, the insurer is liable. It does not apply to arrange-

ments for professional attendance between a physician and an employee for which the employee is liable and the insurer is not, even though relating to an injury for which the insurer may be liable under the act.

All cases which have arisen in this Commonwealth heretofore have had to do with physicians' fees for which the insurer was responsible, and none of them are at all at variance with the conclusion here reached. *Panasuk's Case*, 217 Mass. 589. *Pecott's Case*, 223 Mass. 546. *Huxen's Case*, 226 Mass. 292.

The conclusion reached as matter of interpretation of the statute renders it unnecessary to discuss the constitutional question raised by the plaintiff.

Order dismissing report affirmed.

PERCY F. LELAND *vs.* ELBRIDGE C. BARBER.

Middlesex. January 11, 1917. — September 13, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CARROLL, JJ.

Agency, Real estate broker, Commission. *Contract*, Performance and breach.

In an action by a real estate broker to recover a commission for procuring a purchaser for the defendant's farm, it was *held*, that the judge, who at the request of the defendant had given a ruling that the plaintiff could not recover unless by the time agreed he produced "a customer ready, able and willing to enter into a binding, that is, written, contract to take the property," was right, under the circumstances disclosed by the evidence, in modifying the ruling by stating that he did not intend to rule "that the actual physical presence of the customer at the time and place was necessary."

It is not a universal rule that a real estate broker cannot earn a commission for procuring a purchaser for his customer's land without obtaining a binding contract signed by the purchaser. The signature of the purchaser is only a condition precedent to the payment of a commission when it is made so expressly by the broker's contract of employment or such a condition fairly is to be implied from that contract.

CONTRACT to recover $435 as a commission for services as a real estate broker in procuring a purchaser for the defendant's farm in Framingham and Ashland. Writ dated August 7, 1915.

In the Superior Court the case was tried before *Morton*, J., without a jury. The facts as found by the judge are stated in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. That the plaintiff cannot recover unless before noon on Tuesday, August 3, 1915, he produced to the defendant a customer ready, able and willing to enter into a binding, that is, written, contract to take the property.

"2. That the plaintiff cannot recover unless by noon on Tuesday, August 3, 1915, he was able to and did put the defendant in a position where the defendant could by acceptance of an offer or otherwise have a purchaser legally bound to take the property.

"3. That the plaintiff cannot recover unless by noon on Tuesday, August 3, 1915, the defendant either (1) had a valid and binding contract by some purchaser to take the property or else (2) was responsible by his own refusal to proceed or in some other way for not having such a contract.

"4. That the defendant was entitled on noon Tuesday, August 3, 1915, either to have a good contract for the sale of his property through Mr. Leland or to be free to sell to some one else."

The judge refused to make the second, third and fourth of these rulings, stating that he interpreted these requests as calling for a ruling that the plaintiff was under a legal obligation to present to the defendant a legal, binding contract to purchase, signed by the customer; but the judge found and ruled that such was not the intention of the parties. The judge made the ruling numbered one, stating that he did not intend to rule thereby that the actual physical presence of the customer at the time and place was necessary. The defendant excepted to the judge's refusals to rule as requested and to the ruling as given upon the first request.

The judge found for the plaintiff and assessed damages in the sum of $435 with interest from the date of the writ. The defendant alleged exceptions.

A. R. Graustein, (*A. Berkowitz* with him,) for the defendant.

C. C. Mellen, for the plaintiff.

RUGG, C. J. This is an action to recover a commission on a sale of real estate. It was tried before a judge of the Superior Court, who found the facts and made a finding for the plaintiff. These facts must be accepted as true, for they are supported by the

evidence, and the contract between the plaintiff and the defendant, being oral, can be ascertained only from the testimony. The material facts are these: "The plaintiff, who was a real estate broker, had the defendant's farm listed upon his books for sale for some time previous to July, 1915. . . . Some time later the plaintiff asked the defendant whether if Pitri would give $8,700 for the farm alone the defendant would sell to Pitri at that price, and the defendant said that he would give the plaintiff until noon the next day to see what he could do and would sell to Pitri for $8,700 and would pay a commission to the plaintiff." "It was not the understanding, nor was there any obligation on the part of the plaintiff to have a binding contract delivered by noon." "The plaintiff saw Pitri, and Pitri agreed orally to pay $8,700 and was ready, able and willing to buy the farm at that price. The plaintiff told the defendant, on the next day in the morning, that Pitri had agreed to buy for $8,700, and presented to the defendant an agreement in the ordinary form to sell the estate, for the defendant's signature, not signed, however, by Pitri. The defendant at the time made no objection to the fact that Pitri had not signed it, nor any suggestion of a deposit, but did desire to have his attorney pass upon the papers. The parties accordingly went to the attorney's office, but owing to engagements of the attorney did not see him until almost noon. At the interview in the attorney's office there was present also another customer. Reference then was made for the first time to a deposit and a signed agreement by Pitri. There was some discussion also between the attorney and the parties as to the possibility of the defendant being subject to a claim for a double commission. The defendant, because of fear of being exposed to a double commission, refused to sell to Pitri or to any one else, and left the room. Some weeks later he did sell to a third person. . . . He could have obtained from him on short notice a valid, binding contract to purchase at the price agreed upon, if he had not refused to sell."

The defendant presented three requests for rulings. The first, to the effect that there could be no recovery unless before noon of the day in question the plaintiff produced "a customer ready, able and willing to enter into a binding, that is, written, contract to take the property," was granted but without ruling that the actual physical presence of the customer at the time and place

was necessary. This modification was correct under the circumstances here disclosed.

The actual signature by the purchaser before noon of a binding obligation to buy was no part of the plaintiff's contract with the defendant.

This and the other requests for rulings also raise the question whether a broker can recover a commission without procuring a binding contract of sale. It is settled that in some instances he may, provided that is his agreement with the landowner. In the case at bar the owner did not ask for that kind of a binding contract, nor suggest that he wanted it at the time when he naturally might have been expected to speak of it, if that was what he desired. It is not a universal principle that a binding contract must be actually executed before the broker is entitled to a commission. The broker need not procure such a binding contract unless that is expressly stated or fairly implied in his agreement. *Fitzpatrick* v. *Gilson*, 176 Mass. 477. *Tombs* v. *Alexander*, 101 Mass. 255. *Willard* v. *Wright*, 203 Mass. 406. *Brilliant* v. *Samelas*, 221 Mass. 302. The other requests for rulings were refused rightly.

Exceptions overruled.

PATRICK COGLIANO *vs.* JAMES H. FERGUSON.

Suffolk. January 12, 1917. — September 13, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CARROLL, JJ.

Statute, Exterritorial effect. *Conflict of Laws. Workmen's Compensation Act. Negligence*, Employer's liability, Explosion of dynamite. *Explosives. Dynamite. Evidence*, Presumptions and burden of proof.

The provisions of St. 1911, c. 751, Part I, § 1, doing away with certain defences in actions for personal injuries sustained by employees in the course of their employment, have no application to personal injuries received by an employee outside this Commonwealth.

In an action for personal injuries sustained in the State of Maine while in the employ of the defendant by reason of the explosion of a charge of dynamite that had been left unexploded in a blasting, it appeared that the plaintiff was employed by the defendant, who was a contractor, as the boss in general charge of the work of constructing a slow sand filter for a water district, but that he had nothing to do with blasting, which was in charge of another employee of the

defendant. The plaintiff testified that he had no special knowledge of blasting and did not know that it was a frequent occurrence for charges of dynamite to fail to explode and that consequently after each blast careful inspection was necessary to see whether every charge was exploded. *Held*, that, if the plaintiff was ignorant of any danger arising from an unexploded charge of dynamite, he did not assume the risk of such a hidden danger, and that, being ignorant of the danger, he could not have been lacking in due care in failing to avoid it.

In the same case it was *said* that, if an employer conducting work in which blasting is necessary chooses to put the blasting in charge of one man and to make another man the boss of every part of the work except the blasting, there is no necessary presumption as matter of law that the general boss knows the peculiar and concealed dangers incident to blasting.

In the same case it was *held* that the defendant might have been found wanting in the performance of his duty to furnish a place free from hidden and unknown dangers in putting an employee, even a boss, at work on a ledge where such a secret peril might be lurking after every large blast without giving him warning in this regard.

In the same case it was *said* that the defendant personally took part in directing the work frequently enough to be held responsible for the method of its conduct, and that, if it was necessary for the safety of the workmen that there should be a rigid system compelling an inspection after the firing of each blast, and there was no inspection, the defendant might have been found negligent in failing to provide inspection.

TORT for personal injuries sustained on December 11, 1914, when the plaintiff was in the employ of the defendant at Gardiner in the State of Maine, by reason of an explosion of dynamite. Writ dated April 12, 1915.

The plaintiff's declaration contained seven counts, but the plaintiff waived all except the first, second and fifth. The first count alleged that the defendant negligently put the plaintiff at work in an unsafe place; the second count alleged that the defendant negligently failed to warn the plaintiff of dangers of which the defendant had knowledge and the plaintiff did not; and the fifth count alleged that the defendant negligently failed to inspect a certain blast after it had been fired, in consequence of which the plaintiff was injured.

The answer contained a general denial and alleged lack of due care on the part of the plaintiff and assumption of risk by him.

In the Superior Court the case was tried before *Chase*, J. The following facts were not in dispute at the trial. In the autumn and winter of 1914 the defendant was doing the excavation and other work in connection with the construction of a slow sand filter for the Gardiner water district. At first dirt and boulders were excavated, and early in November operations had been begun upon

a ledge on the premises, necessitating a good deal of blasting. Before this there was some blasting of small boulders, but, after work on the ledge itself began, there was blasting regularly — one or two blasts every day. There were roughly twenty men engaged on the work, laborers, teamsters, a blacksmith and the man who ran the boiler. The day before the accident there had been a failure of some of the holes to explode, but finally the blast was fired. The following day the men were removing the broken pieces of stone. One of these stones, in size about six or seven feet long and four feet through, was difficult to move. One Miller had a pair of horses attached to this stone with a chain and was endeavoring to move it, and one Luciano and the plaintiff were assisting him by using an iron bar on the stone, when there was a sudden explosion, causing the injuries for which this action was brought. The testimony of the plaintiff and that of the defendant and the nature of the accident are described in the opinion.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. On all the evidence the plaintiff is not entitled to recover on his first count.

"3. On all the evidence the plaintiff is not entitled to recover on his second count."

"6. On all the evidence the plaintiff is not entitled to recover on his fifth count."

"10. On all the evidence the plaintiff was not in the exercise of due care."

"12. On all the evidence the plaintiff assumed the risk of the happening of such an accident as is alleged in his declaration to have taken place."

The judge refused to make any of these rulings, and submitted the case to the jury on the first, second and fifth counts of the plaintiff's declaration in a charge to which the defendant took no exception. The jury returned a verdict for the plaintiff in the sum of $10,000; and the defendant alleged exceptions to the refusal of the rulings requested by him.

St. 1911, c. 751, Part I, § 1, is as follows: "In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal

injuries so sustained, it shall not be a defence: 1. That the employee was negligent; 2. That the injury was caused by the negligence of a fellow employee; 3. That the employee had assumed the risk of the injury."

W. B. Luther, for the defendant.

W. W. Clarke, (*C. J. Muldoon, Jr.*, with him,) for the plaintiff.

RUGG, C. J. This is an action of tort to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant by reason of the explosion of a charge of dynamite left unexploded from a prior blast. The accident occurred in Maine. Therefore the rights of the parties are to be settled according to the law of that State unaffected by St. 1911, c. 751, Part I, § 1, of the workmen's compensation act. Such statutes of this Commonwealth have no force outside our borders. *Gould's Case*, 215 Mass. 480. There was no dispute that the law of Maine puts the burden on the plaintiff to prove his own due care and to negative assumption of risk. Otherwise the case is to be governed by the principles of the common law, which are presumed to be the same in Maine as those prevailing in this Commonwealth. *Lemieux* v. *Boston & Maine Railroad*, 219 Mass. 399.

There was evidence from which it could have been found that the defendant had taken a contract to do excavating for the Gardiner water district in Maine and was at the work in person from time to time, and that a large amount of blasting was required to be done in the execution of the contract; that the plaintiff was boss in general charge of the work, but that he had no special knowledge of blasting and did not know that it was a frequent occurrence for charges to fail to explode and that therefore careful inspection was necessary after the firing of each blast to see that every charge was exploded; and that the plaintiff, although the general boss, had nothing to do with blasting, which was in the charge of another employee of the defendant. The course of work at the time of the injury was to drill a series of holes in the rock, charge them with dynamite and explode them by a battery. The evidence tended to show that the charge in one hole failed to explode with the others and that it exploded later when the plaintiff was working near by.

However strange it may seem that a boss of such experience as the plaintiff described himself to be should be ignorant of these

facts about modern methods of blasting by the use of dynamite, still the extent of his actual knowledge in this respect was a question of fact, and the case must be considered on the footing that the jury had a right to give credit to the testimony of the plaintiff and to reject other testimony and inferences in conflict therewith. This is not a case where the uncontroverted facts require one conclusion regardless of the oral testimony of a witness.

It must be assumed, therefore, that although the plaintiff was a boss on this class of work, he was ignorant of the danger from unexploded charges. It hardly can be ruled as matter of law that a boss who is in charge of general work under the circumstances here disclosed assumed all risk connected with it in the absence of some express or implied deceit or some conduct tending to mislead the employer. The defendant testified that he talked with the plaintiff before hiring him, as to his experience in blasting, and was given full assurance upon the point, but apparently that was not found to be the fact. If an employer chooses to put blasting in the charge of one man and to make another boss of every part of the work except the blasting, there is no necessary presumption as matter of law that the latter knows the peculiar and concealed dangers attaching to blasting. The plaintiff did not assume the risk of such a hidden danger as an unexploded blast if he was ignorant of any risk arising from that source. Manifestly, if he was ignorant of the fact of hazard of this kind, he was not lacking in due care by working near it.

The defendant might have been found wanting in the performance of his duty to furnish a place free from hidden and unknown danger, to put even a boss at work on a ledge where such a secret peril might be lurking after every large blast, without giving him warning in that respect.

The defendant himself was present frequently enough to be held responsible for the method of the conduct of the work. If it was necessary for the safety of the workmen that there should be a rigid system of inspection after the firing of each blast, and there was no inspection, the defendant may have been found negligent in failing to provide inspection. The case is governed in its crucial aspects by *Hopkins* v. *O'Leary*, 176 Mass. 259, *Hooe* v. *Boston & Northern Street Railway*, 187 Mass. 67, *Byrne* v. *Farnum*, 188 Mass. 219, and *Marana* v. *McDonough*, 212 Mass. 189.

The testimony of the plaintiff as to his state of ignorance of this risk, whatever its weight may seem to be, cannot be characterized as insufficient in law to warrant submitting the case to a jury on the three counts. The case is distinguishable for this reason from *Hickey* v. *Worcester*, 213 Mass. 125, *Allard* v. *Hildreth*, 173 Mass. 26, and similar cases.

Exceptions overruled.

PEOPLES NATIONAL BANK *vs.* ELIZA B. MULHOLLAND & another.

Suffolk. March 7, 1917. — September 13, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Recommittal of master's report. *Trust*, Creation, Commingling of property, Tracing trust property. *Evidence*, Presumptions and burden of proof.

After the rescript of this court issued in accordance with the decision at an earlier stage of this suit in equity reported in 224 Mass. 448, the Superior Court recommitted the case to the master for the determination of certain material facts in regard to the plaintiff's title to a certain importation of hides, and it here was *held* that the interlocutory degree recommitting the case to the master for this purpose was proper.

Where a bank, as the means of advancing money to a dealer to pay for an importation of hides, purchases the hides in its own name directly from the foreign seller and pays for them, and then, owning the hides, delivers them to the dealer in exchange for a trust receipt in which the dealer declares that he holds the hides "in trust" for the bank as its property with liberty to sell them for the bank's account or to manufacture and remanufacture the hides without cost or expense to the bank, and agrees "to keep said goods, and the manufactured product and proceeds thereof, . . . separate and capable of identification" as the bank's property, with a provision that the bank may at any time cancel the trust and repossess itself of the hides, raw or as manufactured product, a valid trust is created and the dealer holds the hides with the obligations incidental to the fiduciary relation.

In a suit to enforce the trust above described it was *held* that it was the duty of the dealer to keep the hides at all times, both in their raw and their manufactured state, "separate and capable of identification," and that that duty was not performed by having one person alone, who afterwards died, sufficiently familiar with the goods to be able to make a separation, and that, on the death of such person, there was a breach of the duty of the dealer under the trust receipt in having commingled the trust property with other hides so that the possibility of picking out from the mass the property of the bank was gone.

In the same case it was *held* that such commingling was done by the dealer in disregard of its obligation to the bank and was a breach of its fiduciary duty.

In the same case it was *held* that there had been a sufficient tracing of the hides of the bank into the commingled mass to establish a lien for the bank's claim, and, a part of the mass having been sold and a part destroyed by fire, the bank's lien attached to all that remained of the lot.

One, who without justification and in breach of fiduciary obligation has commingled his own property with that of another with which he has been entrusted, must at his peril return to the owner that which thus has been appropriated by him wrongfully and must prove what belongs to him or lose it.

In the case above described it appeared that a separate deposit had been made by the dealer of the proceeds received from sales of a part of the commingled goods to a certain corporation, and it was *held* that this separate deposit stood on the same footing as the unsold part of the commingled goods and was impressed with a like trust for the benefit of the plaintiff.

BILL IN EQUITY, filed in the Superior Court on February 4, 1913, to enforce an alleged trust in certain hides and the proceeds thereof named in a trust receipt dated March 22, 1910, and signed "E. F. Mulholland Co."

After the entry of the rescript issued in pursuance of the decision reported in 224 Mass. 448, an interlocutory decree was made by *Lawton*, J., recommitting the case to the master for the purposes stated in the opinion. The master filed a supplemental report, to which no objections or exceptions were filed, and thereafter by order of *Wait*, J., after a hearing of the parties, a final decree was entered, which ordered

"That the master's supplemental report be and the same is hereby confirmed; and, it appearing that the plaintiff received the bill of lading as the agent of Kaufman, and upon accepting the draft to which it was attached, took title to the hides as security to itself for payment of the amount it had obligated itself to pay to Kaufman, and that it thereafter paid Kaufman out of its own funds; and that the only title which E. F. Mulholland Company ever had in and to the hides was such title as it held under the terms and provisions of the trust receipt;

"That as a matter of law, in view of the findings of the master and inference to be drawn therefrom, the deposits and the leather are sufficiently identified with Lot No. 73 to impress them with the trust claimed;

"That the claim of the Peoples National Bank against the firm of E. F. Mulholland and Company, composed of the defendant Mulholland and the late Cornelius J. Coughlin, be and hereby is

established at the sum of $4,540.57, together with interest thereon at the rate of six per cent from October 1, 1911, amounting in all on this tenth day of November, 1916, to $[5]933.01, at which sum the debt due to the plaintiff as aforesaid is established;

"That the defendant Coughlin, as administratrix of the estate of the late Cornelius J. Coughlin, has in her hands, possession and control the sum of $2,241.22, and the sum of $997.59 (together with any interest that may have accumulated thereon since the date of the deposit of said sums in the Federal Trust Company) as the proceeds of the property of the plaintiff described in the plaintiff's trust receipt set forth in the bill, together with 1,510 feet of mat calf leather and 10,452 feet of black ooze calf leather, which is also the proceeds of the property of the plaintiff described in said trust receipts, and that said moneys and said leather are the property of the plaintiff; and the said defendant Coughlin, administratrix as aforesaid, shall forthwith pay over and deliver unto the plaintiff said moneys and said leathers, the same to be applied in reduction of the debt due the plaintiff;

"That the defendant Mulholland pay unto the plaintiff the aforesaid sum of $5,933.01, with interest thereon subject to a credit to be allowed of the amount paid to the plaintiff, together with that realized from the aforesaid leather, and let execution issue therefor. The defendants are hereby directed to pay the plaintiff its costs, amounting to $61.28, and execution is to issue therefor."

The defendant Ellen T. Coughlin, administratrix, appealed from this decree.

W. J. Cusick, for the defendant Ellen T. Coughlin.

Lee M. Friedman, for the plaintiff.

RUGG, C. J. It was decided when this case was here at an earlier stage, as reported in 224 Mass. 448, that there was no finding by the master warranting an inference that the plaintiff purchased the hides from the foreign seller, Kaufman, on behalf of E. F. Mulholland and Company, hereafter called the firm, now represented by the defendants, and that it took title to itself as security for its advances in making such purchase and received the bill of lading and draft as agent for Kaufman, the original seller. Thereafter, the case was recommitted by the Superior Court to the master for determination of the facts as to the purchase of the hides from the foreign owner, Kaufman, and the vesting of the

title thereof, and the exact relation of the plaintiff to the purchase, the bill of lading, and the draft.

The interlocutory decree recommitting the case to the master for this purpose was proper. The first trial before the master had proceeded upon a footing respecting the plaintiff's title, which, in the light of facts now revealed, might have wrought injustice. The right of the plaintiff was not disclosed by the earlier report. It was within the power of the Superior Court under these circumstances, after rescript, to order a further hearing upon this point. *Day* v. *Mills*, 213 Mass. 585.

The supplemental report of the master plainly shows that the plaintiff purchased the hides in its own name and interest for the ultimate use of the firm, directly from the foreign seller, and paid for them. It therefore had the legal title to the hides and rightly dealt with them as owner in its relations with the firm, and was not a mortgagee or pledgee. The trust receipt which was employed by the plaintiff in its transaction with the firm is a well known instrument of commerce whereby the banker advancing the money on an importation takes title directly to himself and as owner delivers the goods to the dealer in whose behalf he is acting secondarily and to whom the title ultimately is to go when the primary right of the banker has been satisfied, the title remaining in the banker until the price is paid to him. The validity of such a trust receipt has been upheld in numerous of our decisions, most of which are collected in 224 Mass. at page 451. *Moors* v. *Drury*, 186 Mass. 424. *Commercial National Bank* v. *Canal-Louisiana Bank & Trust Co.* 239 U. S. 520, 524. *Century Throwing Co.* v. *Muller*, 116 C. C. A. 614. *In re Cattus*, 106 C. C. A. 171. *In re Coe*, 106 C. C. A. 181.

The plaintiff delivered the possession of the ninety-two bales of hides in question to the firm under a trust receipt with a sufficient description of them and with stipulations that the hides should be held "in trust" for the plaintiff and as its "property, with liberty to sell the same for their [its] account or to manufacture and remanufacture the same without cost or expense to them [it], and we also agree to keep said goods, and the manufactured product and proceeds thereof, . . . separate and capable of identification as their property," with further provisions to the effect that the plaintiff might at any time cancel the trust and repossess itself

of the hides, raw or as manufactured product. The relation between the bank and the firm growing out of the trust receipt was fiduciary and the latter was bound to the obligations flowing from that relation.

The firm received these ninety-two bales of hides and for its own convenience designated them as "Lot number 73." Some of these hides were sold and others were destroyed by fire. These drop out of the case. The others were sent to tanners to be tanned and in course of manufacture were commingled with three other much smaller lots of hides referred to as lots 58, 60 and 72, which, to quote the words of the master's report, "were held by the firm; under trust receipts to secure notes which had been given by the firm to the plaintiff, each of the notes and trust receipts having been in the same form as the note and trust receipt for lot 73 and each of the notes, except that given for lot 73, have been paid; that of the several lots of leather so mixed, which were thereafterwards known as lots 1 to 8, a part was delivered to the A. J. Foster Company to be sold on account for the firm of E. F. Mulholland and Company and a part was retained or disposed of by E. F. Mulholland and Company; that in lots 1 to 8 the proportion which lot 73 bore to the other lots with which it was mixed was about ninety per cent of lot 73 to ten per cent of all of the other lots that the skins contained in lots 58, 60 and 72 were, while in the raw state, of a higher grade than any of those contained in lot 73, but there was no evidence what grade of manufactured skins resulted from the tanning of either or all of the lots; that it is impossible to more definitely determine what part of lot 73 was delivered to the A. J. Foster Company, or what part was retained or disposed of by E. F. Mulholland and Company." The sum of $2,241.22 received from sales of the mixed lot of leather made by the A. J. Foster Company is now in a special bank deposit, and the sum of $997.59 received from sales made by the Mulholland firm from the mixed lot of leather is a part of a general deposit to the credit of that firm, and a certain quantity of the mixed lot of leather is in the hands of a bailee. It is not found that this commingling of the hides was done fraudulently. Perhaps it is a fair inference that the managing partner of the firm, Coughlin, could at all times during his life have sorted out the hides covered by the trust receipt and that, if he had lived, he could

have made the separation whenever required. But it was his and the firm's duty under the terms of the trust receipt to keep the hides at all times, both in their raw and manufactured state, "separate and capable of identification." That duty was not performed by one person alone being sufficiently familiar with the goods to be able to make a separation; but it required such a segregation or susceptibility to recognition that any one familiar with the trade would be able to select the property covered by the trust receipt, so that the plaintiff might with reasonable effort repossess itself of its property at any moment. There was a breach of that duty by the commingling with other hides so that the possibility of picking out of the mass the property of the plaintiff was gone.

It is not necessary to determine that there was any moral turpitude involved in such commingling. There is no ground for the inference that it was done with the knowledge or consent of the plaintiff or that it arose through accident or mistake, or the operation of a superior force. It was done with a conscious purpose. It was at the lowest intentional or through want of proper care. It was done in disregard of their obligation to the plaintiff. It was in this sense a wilful intermixing. It was a breach of a fiduciary duty owed to the plaintiff and an unlawful invasion of its property rights. The commingling having been done through the fault of the firm and being a wrong against the plaintiff, the burden of separating and tracing further its own property does not rest upon the plaintiff. Where at common law through no fault of the owner there has been a negligent commingling of his property with that of another, so that it cannot be distinguished, it is held to be unjust to put the loss on the innocent and careful owner. It ought to fall rather "on him whose carelessness or folly or misfortune" has caused the indiscriminate intermixture. A commingling which flows from carelessness or breach of obligation belongs to the same class as one caused by intentional misconduct. *Ryder* v. *Hathaway*, 21 Pick. 298, 306. *Willard* v. *Rice*, 11 Met. 493. *Smith* v. *Sanborn*, 6 Gray, 134. *Adams* v. *Wildes*, 107 Mass. 123, 125. *Stearns* v. *Herrick*, 132 Mass. 114. *Union Naval Stores Co.* v. *United States*, 240 U. S. 284, 290. See *Westinghouse Electric & Manuf. Co.* v. *Wagner Electric & Manuf. Co.* 225 U. S. 604, 619, 622. See Ann. Cas.

1913 E 665. The rule was stated by Chancellor Kent in *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62, 108, in these words: "If a party having charge of the property of others, so confounds it with his own, that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property, or lose it." The equitable doctrine as to trusts is as was stated in *Lowe* v. *Jones*, 192 Mass. 94, 101, and requires "the identification of the trust property as passing into some other specific property or fund, as distinguished from the general assets."

It is plain that if the hides all had remained in one mixed lot of leather and none had been sold, there has been a sufficient tracing of the hides of the plaintiff into that commingled lot to permit it to establish a lien upon the lot for its claim. At common law under the rule applicable to commingled goods it could have held the entire lot to the satisfaction of its claim. It can hold that which remains of that lot. One, who without justification and in breach of fiduciary obligation has commingled his own property with that of another with which he has been entrusted, must at his peril return to the owner that which thus has been wrongfully appropriated. *Hittinger Fruit Co.* v. *Cambridge*, 218 Mass. 220, 226. *Spence* v. *Union Marine Ins. Co. Ltd.* L. R. 3 C. P. 427, 437. Since the amount received from sales of the mixed lot by the A. J. Foster Company constitutes a separate deposit, it stands on the same footing. The amount received from sales out of the mixed lot by the firm being still on deposit as part of a larger fund, it is impressed with a like trust for the benefit of the plaintiff. *Hewitt* v. *Hayes*, 205 Mass. 356. *Portuguese Fraternity* v. *Liberty Trust Co.* 215 Mass. 27. *National Bank* v. *Insurance Co.* 104 U. S. 54. *Peters* v. *Bain*, 133 U. S. 670, 694. *Harris* v. *Truman*, 7 Q. B. D. 340, 358.

The facts in the case at bar illustrate the converse of the principle applied in *Lowe* v. *Jones*, 192 Mass. 94, to the effect that where the proceeds of a fund cannot be traced no trust can be established. Here the property of the plaintiff is traced directly. It goes much further than a mere general enrichment of the estate of the firm arising from the conversion of property belonging to the plaintiff. Therefore its rights are established.

The decree is to be modified so as to make accurate the calcula-

tions of interest to the date of its final entry, and to include the costs of this appeal, and as thus modified is affirmed.

So ordered.

LEWIS PARKHURST & others, trustees, *vs.* M. FRANCESCA G. GINN & others.

Middlesex. March 13, 14, 1917. — September 13, 1917.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Devise and Legacy. Trust, Administration, Implied power of trustee to change investments. *Capital and Income. Tax. Equity Jurisdiction,* Bill for instructions. *Interest.*

A will, which in many different clauses referred unmistakably to a single trust fund, contained the following direction to the trustees to whom the residue of the testator's estate was devised and bequeathed, the World Peace Foundation there named being a charitable corporation which the testator in his lifetime had caused to be incorporated: "I now authorize and instruct my Trustees to pay over annually, or oftener if business convenience may permit, to the said World Peace Foundation, the income, as nearly as said Trustees can conveniently reckon it, of Eight Hundred Thousand Dollars ($800,000.00), but not exceeding Forty Thousand Dollars ($40,000.00) per year." The estate in the hands of the trustees amounted to more than $2,000,000. Upon a bill by the trustees for instructions, it was *held* that the trust was to be administered as one fund and that the trustees were not to set apart any of the trust property as a separate fund for the benefit of the World Peace Foundation.

Upon the same bill for instructions, in answer to a question as to the method by which the amount or the rate of income payable to the World Peace Foundation was to be reckoned, it was *held* that the annual payment to the World Peace Foundation for any year should be the proportionate part of the total net income of the fund which $800,000 bore to the entire principal of the fund, but not exceeding $40,000 annually, and that the gift was not a mere annuity of $40,000 a year which it would have been a simple thing for the testator to create, if that had been his purpose; so that the method of computation would be to find the rate of the net income returned by the entire fund during the year in question and to compute the income of $800,000 at that rate, but in no event to exceed $40,000 for the year.

Upon the same bill for instructions it appeared that the amount of unproductive real estate was small compared with the total amount of the fund, that the income of the fund met all the requirements of the annuities provided for by the will and was likely in the future to provide the maximum annual payment to the World Peace Foundation, and it was *held* that in reckoning the amount of income payable to the World Peace Foundation in any year, the entire proceeds of the sales of vacant real estate should be treated as a part of the principal of the trust property and should not be apportioned between principal and income.

Upon the same bill for instructions it was *held*, that the premiums on the bonds given by the trustees, as authorized to be paid by R. L. c. 150, § 15, should be paid out of income and not out of principal.

Upon the same bill for instructions it was *held*, that, the World Peace Foundation being a charity, as decided in *Parkhurst* v. *Treasurer & Receiver General*, *post*, 196, the gift to it was not subject to a legacy and succession tax, and that the ordinary annual taxes were to be paid as a part of the expenses of the trust to be deducted before the net income could be ascertained.

Upon the same bill for instructions it was *held* that under St. 1912, c. 678, § 1, as amended by St. 1913, c. 498, relating to legacy and succession taxes, which provides that "All taxes under this act shall be paid out of and chargeable to capital and not income, unless otherwise provided in a will . . . or other instrument creating the grant or gift;" the will under interpretation containing no provision otherwise, the legacy and succession taxes on the several annuities which the trustees were directed to pay were payable out of the capital fund of the trust, that being the only capital out of which such taxes could be paid, and that other taxes assessed against the annuities were to be borne by and paid out of the annuities on which they were levied, there being nothing in the will under interpretation to the effect that the annuities should be paid in full free from all taxes.

In a bill for instructions trustees under a will are not entitled to be instructed as to payments made by the executors of the will for taxes or otherwise and allowed by the Probate Court in the executors' accounts.

Upon the bill for instructions named above the trustees asked to be instructed as to the deductions from income, capital or otherwise of the amount of taxes upon the interest of the World Peace Foundation in the property of the testator situated in the State of Minnesota, which were paid by the executors and charged by the executors "against capital of the estate, and no part thereof against income." It did not appear that the trustees had paid or had been asked to pay this tax. It appeared that the tax had been paid by the executors, that the payment belonged in their account and that the executors had filed already at least one account, which had been allowed, and it was *held*, that the fund out of which this tax was payable was a matter to be settled in passing upon the account of the persons who rightly had paid the tax out of properties and funds in their hands, and that the trustees had received only the residue of the estate after the payment had been made, and therefore it did not appear that the trustees had any occasion or any right to request instructions in regard to the matter.

Upon the same bill for instructions it was *pointed out* that by the express terms of the trust the testator directed that the annuities to his family should be preferred to all other legacies in case of a deficiency and that in case of necessity they should be a charge upon both principal and income, although this did not appear to be material in the present state of the trust.

Upon the same bill for instructions it was *held* that, as stated above, the entire trust fund was to be treated as a unit and that all the annuities were to be paid out of it instead of being supported by the establishment of separate funds.

In the same case a like conclusion was reached in regard to certain shares in the corporation owning the business formerly carried on by the testator which were to be kept available for two sons of the testator.

In the same case the court declined to instruct the trustees as to the income which in a contingency might be payable to one or both of the sons of the testator,

there being no present obligation on the part of the trustees to set apart any income for this purpose, and a broad discretion as to the management of the trust being vested in the trustees with which this court would not undertake to interfere.

In the same case it was *pointed out* in regard to the income to be paid to the World Peace Foundation that there was no provision in the terms of the trust for making up a deficiency in one year out of the excess of another year.

In the same case it appeared that the article of the will devising and bequeathing all the residue of the testator's property to the trustees to constitute a general fund, as modified by a codicil, provided that, "If and when (after the payment of the foregoing gifts and legacies and the reserve of sufficient trust funds to provide for outstanding annuities and other gifts of income, absolute and contingent,) principal of my estate becomes available for distribution, I authorize and instruct my Trustees to make gifts and to dispose of such principal as follows:" Then followed gifts of $10,000 each to three institutions, one of which was the college of which the testator was a graduate, and a gift to a person in "recognition of what she has for a long time been doing [for one of the institutions], practically without compensation." A further contingent gift of $15,000 was made to that institution payable within three years after the first. The possible maximum of the gifts was $50,000 and the total amount of those immediately payable was $35,000. If these legacies all should be paid, the trust fund still would slightly exceed $2,000,000. The annual income was more than $100,000 a year. A purchase of annuities out of the trust fund sufficient to meet the requirements of the will would leave in the fund more than $800,000, the income of which up to $40,000 was required for the payments to the World Peace Foundation. Under these and all the other circumstances that appeared on the record, it was *held* that the time had arrived for the payment of the legacies mentioned above which were presently payable and that they should not be withheld longer.

In the same case it was *held* that, as these legacies became due only upon the happening of the contingency that principal of the estate had become available for such payment after satisfying all prior legacies, absolute and contingent, that event should be considered to have happened on April 11, 1916, and not before, and that therefore the absolute legacies, amounting to $35,000, should bear interest from that date at the rate of four per cent per annum in accordance with St. 1915, c. 151, § 2.

In the same case it was *held* that the trustees should retain for the time being as a part of the capital of the fund the balance of the accumulated cash, whether of principal or income, and that they should not distribute at present any part of the final residue of the estate.

In the same case it was *held*, that, although the power to invest and reinvest the trust fund was not conferred expressly upon the trustees, this power was conferred by necessary implication, because, in order to perform the duties required of them, the trustees necessarily must invest and keep invested the trust funds safely and productively in such property and securities as are recognized as appropriate for trust funds or were authorized by the will.

In the same case it was *held*, that certain annuities provided by the testator for two of his children clearly were intended for the life of each and for no less period.

BILL IN EQUITY, filed in the Supreme Judicial Court on July 27, 1916, by the trustees under the will of Edwin Ginn of Winchester,

who died on January 21, 1914, leaving a will dated July 20, 1911, with a codicil dated February 17, 1912, for instructions.

The case came on to be heard before *Pierce*, J., who at the request of the parties reserved it upon the pleadings and the master's report for determination by the full court.

The specific instructions requested by the trustees were as follows:

"First: Whether the plaintiffs shall set aside any of the trust property as a separate fund to be held by them for the benefit of the World Peace Foundation, as provided by the will, and if so, what property shall be so set aside and held.

"Second: In what manner and by what method is the amount or rate of income payable to the World Peace Foundation under said will to be reckoned; whether it shall be that amount of income received from a specified part of the trust property designated for that purpose, or shall be the average rate of income received on the whole trust property, or any specified part thereof, of which the sum of $800,000 is to be deemed a fractional part, or whether it shall be reckoned in any other manner.

"Third: Whether in the reckoning of the income payable to the World Peace Foundation under said will, proceeds of the sales of vacant real estate shall be treated as principal of the trust property, or whether the same shall be apportioned between principal and income.

"Fourth: Whether in the reckoning of the income payable to the World Peace Foundation under said will, the premiums paid upon the bonds of the executors and of the trustees under the will shall be charged against principal or against income.

"Fifth: Whether in the reckoning of the income payable to the World Peace Foundation under said will, any deductions shall be made on account of local annual taxes or of inheritance taxes, heretofore assessed upon and paid by the representatives of this estate from the property in their hands, or which shall hereafter be assessed upon the plaintiffs and paid by them thereon, and, if so, on what basis such deductions shall be reckoned.

"Sixth: Whether the plaintiffs shall deduct from the several annuities given by the will the amount of Massachusetts inheritance taxes and other taxes assessed and paid thereon, or whether the same are payable from the capital of the estate, or any part thereof, or are to be dealt with in any other manner.

"Seventh: Whether the plaintiffs shall deduct from the income payable under the will to the World Peace Foundation the amount of any taxes upon the interest of the said foundation, under the will, paid to the State of Minnesota, or whether the same were payable from the capital of the estate, or any part thereof, or are to be dealt with in any other manner.

"Eighth: Whether the annuities given by said will are a charge upon both principal and income of said estate, and whether a fund is to be erected by the plaintiffs for the support of said annuities, and if so, what property is to be so set aside, or otherwise designated and held for the protection of the respective annuitants, and what amount thereof, and in what manner shall the same be invested by the plaintiffs.

"Ninth: Whether the plaintiffs are to set aside and designate shares in Ginn and Company or other property, to be held for the purposes designated in article fifteen, clause eight of the will, for the benefit of the testator's sons, Maurice or Edwin, or either of them, and if so, what amount of property is to be so set aside and held, and for what period shall the same be held.

"Tenth: Whether the plaintiffs are to reserve and set aside, or designate in any manner, any portion of the income from the trust estate, and hold the same for the purposes stated in article fifteen, clause eight of the will, for the benefit of the testator's sons, Maurice or Edwin, or either of them, and if so, what amount of income is to be so set aside and held, and for what period shall the same be held.

"Eleventh: Whether any amount is payable to the World Peace Foundation from the accumulated income of the trust now in possession of your plaintiffs, on account of income due to said foundation, accumulated and remaining unpaid for the year 1914, or for the year 1915, down to January 21, 1916.

"Twelfth: Whether the plaintiffs shall pay from the cash now in their hands and possession the amounts given by the will to the legatees named in article fifteen, clause thirteen thereof, as modified by the codicil, and, if so, from what date interest thereon, if any, shall be paid to the respective legatees.

"Thirteenth: Whether the amount of said legacies contained in article fifteen, clause thirteen, in case the court shall decide that the same be not now paid, shall be held by the plaintiffs as a part

of the whole residuary trust fund, or shall be set aside in a separate fund and held for the benefit of said legatees pending the time when the court shall decree that the same may be paid over, and if so, as of what date shall the same be set aside and shall interest run thereon, or shall the same be dealt with in any other manner.

"Fourteenth: Whether the remaining cash principal of the trust fund, or any part thereof, now in the possession of the trustees, shall be paid over to the residuary legatees, and if not, in what manner the same shall be held and managed by the plaintiffs.

"Fifteenth: Whether the accumulated cash income, or any part thereof, now in the possession of the trustees, shall be paid over to the residuary legatees or dealt with in any other manner.

"Sixteenth: Whether the plaintiffs, as trustees, have any power under the will to invest and reinvest the trust property, or any part thereof, and if not, whether the court will grant such power and authority, and in so doing will define the extent and limits of the power as granted.

"Seventeenth: Whether the gifts to Marguerita and Edwin under article fifteen, clause five, are for their lives respectively, or for any other period."

F. W. Knowlton, for the trustees, stated the case.

A. Lord, for M. Francesca Grebe Ginn and Antonia Grebe.

G. C. Coit, for Maurice E. Ginn.

A. D. Hill, for the World Peace Foundation.

J. P. Russell, (*J. T. Pugh* with him,) for the trustees of Tufts College.

R. B. Coolidge, for Westbrook Seminary.

C. R. Clapp & C. H. Walker, for the Charlesbank Homes.

W. H. Dunbar, for the Ingleside Home and Mrs. Plummer.

H. S. Riley, for Marie Emerson Riley, submitted a brief.

T. W. Proctor, guardian *ad litem* of minor defendants, *pro se*.

RUGG, C. J. This is a petition by the trustees under the will of Edwin Ginn for instructions as to certain of their duties in the execution of their trust. The estate in their hands is something in excess of $2,000,000. Edwin Ginn died on January 21, 1914. He was the founder and senior member of the firm of Ginn and Company, publishers of educational and other books, and most of his estate was invested in that firm. The scheme of his will, shortly stated, is this: Legacies of different sums, aggregating about

$200,000, are given by the first fourteen articles, all of which have been paid in full by the executors. By article sixteen a power of sale is conferred upon the executors and the trustees, and by article seventeen the executors are appointed. This petition does not relate directly to any of these articles. The trust is created by article fifteen, which contains fifteen clauses. By the first seven clauses annuities are given to various persons, principally to members of the testator's family, amounting at present to $47,400, and having a maximum possibility of $51,000. Chief among these is an annuity of $25,000 to his widow for life. By clause eight provision is made in considerable detail for the transfer under certain conditions to each of the testator's two sons of one thousand shares in the firm of Ginn and Company and for the sale by the trustees to each of these sons of a further number of shares, so that each may have an ownership equal to one twelfth of the entire capital of that publishing house. By clause nine provision is made for the retention of the Ginn homestead in Winchester as a part of the trust so long as occupied by his children or grandchildren, a life estate having been created in it for the benefit of his widow by another article. By clause ten direction is given to the trustees respecting the carrying as a part of the body of the trust of certain shares in Ginn and Company, pursuant to powers, rights and options in its partnership articles. By clause eleven provision is made for the World Peace Foundation. By clause twelve the continued investment of the present proportional part of the trust fund in Ginn and Company is expressly declared to be safe and proper. By clause thirteen, as modified by the codicil, pecuniary legacies amounting immediately to $35,000 and having a possible maximum aggregate of $50,000, are given out of the principal of the fund, after adequate provision has been made for the foregoing annuities and gifts of income. By clause fourteen the residue of the estate is divided among certain educational and charitable institutions. Clause fifteen relating to anticipations and deduction of legacies, is not involved in the issues here raised.

1. The first request for instructions is whether the trustees shall set apart any of the trust property as a separate fund for the benefit of the World Peace Foundation. The general plan of article fifteen does not manifest a design for division of the body of the trust into distinct funds for the support of each

beneficiary or of several groups of beneficiaries. The gift to the trustees, although most comprehensive of the entire residue of the property of the testator, nevertheless is single in nature. It is to the persons named "in trust, with the following powers and for the following purposes," succeeded first by the clauses establishing annuities and then by the one for the World Peace Foundation. The form of the gift, so far as it goes, indicates that the fund is a unit.

Other parts of the will confirm the interpretation that the trust is to be administered as one fund. In article two the testator directed that, if the homestead estate is sold during the life of his wife, the proceeds after her death shall "constitute a part of the trust fund hereinafter provided for the general residue of my estate." In article fifteen, by clauses three and four, gifts are made "from the principal of the trust fund," by clause four, a gift out of the income of the "trust fund," and by clause five, a gift "from the income of the trust estate;" by clause ten in two places the trustees are instructed to hold shares of Ginn and Company "as a part of the principal of the trust fund;" and in clause fourteen the testator directs that the balance of seven twentieths of the entire rest and residue of the estate "shall continue to be held by my Trustees for the benefit of the World Peace Foundation, the income to be paid over to said Foundation, subject, however, to the same terms and conditions hereinabove set forth with relation to the payment of the income . . . of $800,000 of the principal of said trust fund." It is not likely that these phrases, referring unmistakably to a single trust fund, would have been used if a separation into several funds had been intended.

The words which state the provision for the World Peace Foundation disclose a plain design that it is not to be a segregated fund but a part of the income of a larger fund. The crucial and operative sentence is this: "I now authorize and instruct my Trustees to pay over annually, or oftener if business convenience may permit, to the said World Peace Foundation, the income, as nearly as said Trustees can conveniently reckon it, of Eight Hundred Thousand Dollars ($800,000.00), but not exceeding Forty Thousand Dollars ($40,000.00) per year." These are the words of gift. They do not express the idea of a separate fund, nor fairly permit the inference that that was intended. If a fund was to be

set apart, there would be no meaning for the words "the income, as nearly as said Trustees can conveniently reckon it." Yet it is a rule of common sense as well as of testamentary construction that, where reasonably practicable, forceful meaning and effect shall be given to all the words used. The income of a definite fund is a fixed amount. When its expenses are deducted from its receipts an exact sum is found. No reckoning is needed, and it does not depend upon the convenience of anybody to ascertain the income of a separate fund with absolute accuracy. It requires no estimation to discover it without variation from the precise fact. Yet a likelihood of possible variation is the thought conveyed by the operative words of the gift. Those words aptly express the idea that the source from which the income is to flow is a larger fund than needed to produce this single annual payment, earning by its several investments different rates of interest, where the computation of the part of income rightly to be apportioned to $800,000 as an aliquant part of the principal might require reckoning and might be subject to some variation from minute exactness.

Where the testator desired to create separate funds, that purpose is expressed in apposite words. In clause five of article fifteen he directs the trustees in a certain contingency to withhold a part of two of the annuities, "investing such part so withheld in a separate trust fund." In article two, also, are directions to the trustees to hold the proceeds of the sale of the homestead "in a separate trust" during the life of the widow if it is sold.

The nature of the estate left by the testator, largely invested in the publishing house bearing his name, and the directions which involve a continuance of a considerable part of the fund in the same business, would render difficult any just separation of several funds.

The words of gift to the World Peace Foundation express a double limitation: It is (1) of the income of an amount not exceeding $800,000, and (2) in no event can the annual income exceed $40,000. Both these restrictions can be observed better through a series of years by means of the administration of a larger fund than by the segregation of an amount of securities equalling $800,000 at the beginning but liable to vary materially as time goes on, through almost inevitable changes in the value of investments.

The testator was a college graduate, and presumably a man of great force, acute intelligence and wide experience, whose life work had been in business closely affiliated with education. He had given prolonged study to the plan for the World Peace Foundation, and had discussed it frequently with his intelligent attorney who drafted the will. The will must be construed giving due weight to the natural inference that words expressive of benefaction for that end were chosen with care for the purpose of disclosing plainly a carefully matured scheme to carry out a long cherished design close to the heart of the testator.

The stray references in clauses thirteen and fourteen to the "$800,000," and "the fund of $800,000, or thereabouts, originally set aside" for the cause of peace are not expressive of the testator's main purpose touching that subject and cannot be taken to supply a requirement omitted elsewhere, that either as matter of bookkeeping or of physical segregation, that sum must be actually put apart and treated as a fund distinct from the main fund. At least until the annuities have all or substantially all been paid in full, the foregoing considerations apply; and it seems the manifest purpose of the testator that one great common fund should support all his benefactions under article fifteen except as specified in clause five.

The facts found by the master, assuming that they all are competent and may be considered, do not lead to a different conclusion.

In order to avoid misapprehension it may be added that no instruction is intended to be given as to the manner in which the trustees shall keep their books. That is a matter of administration about which the will contains no direction. The first request for instructions is answered in the negative.

2. The second request is for instruction as to the method by which the amount or rate of income payable to the World Peace Foundation is to be reckoned. The answer to this question, also, depends upon the correct construction of the crucial and operative sentence of gift already quoted from article fifteen, clause eleven. The reasons, which have led to the decision that the residue of the estate given to the trustees is to be treated and administered as a single fund, require the conclusion that the payment to the World Peace Foundation shall be that proportionate part of the total net income of the fund which $800,000 bears to the entire

principal of the fund, but not exceeding $40,000 annually. It is the ordinary rule that a gift of income means the net and not the gross income, in the absence of something showing a contrary intent. *Watts* v. *Howard*, 7 Met. 478, 482. *Stone* v. *Littlefield*, 151 Mass. 485, 488. It would have been simple for the testator to have provided for an annuity of $40,000 if that had been his purpose. He knew how to do that unequivocally for the benefit of members of his family and others to whom he desired to make that kind of gift. It would have been equally simple for him to have given the income of a particular fund or of a fund of a specified amount. He did not make a gift of either kind. But he did direct his trustees, to whom a large general fund is given, to pay over to that beneficiary annually or oftener if permitted by "business convenience . . . the income, as nearly as the said Trustees can conveniently reckon it" of $800,000. These words mean, in their context and in the light of conditions well known to the testator, that the net income of all the investments apportioned equally to the entire principal of the trust property with calculation of the resulting rate is to be taken as the income rate, and that rate computed on $800,000, but in no event to exceed $40,000, shall be paid annually to the World Peace Foundation.

This conclusion is not overcome by the abbreviated reference in clause eleven "to continue the payment of said sum of $40,000.00 to said World Peace Foundation." These words are not used in defining the gift, but are a chance phrase alluding to that which elsewhere was accurately defined. The homestead estate is to be excluded in considering this aspect of the case. The life use of that property and the income of its proceeds in the event of its sale are given to the widow and it has not yet become a part of the trust fund.

3. The third request for instructions is: "Whether in the reckoning of the income payable to the World Peace Foundation under said will, proceeds of the sales of vacant real estate shall be treated as principal of the trust property, or whether the same shall be apportioned between principal and income." The unproductive real estate is small compared with the total amount of the fund. The income meets all the requirements of the annuities and for the future appears likely to provide the maximum annual payment to the World Peace Foundation. Under these circum-

stances and in view of the terms of the gift to the World Peace Foundation it seems to accord more with what may be presumed to have been the intent of the testator to treat the entire proceeds of sales of real estate as principal, thus following *Jordan* v. *Jordan*, 192 Mass. 337, rather than to apportion the proceeds between income and principal according to the rule of *Edwards* v. *Edwards*, 183 Mass. 581, and of the numerous cases there reviewed.

4. The fourth question relates to the payment of premiums on the bonds of trustees. The payment of such expenses is expressly authorized. R. L. c. 150, § 15. These should be paid out of income and not out of principal. The ordinary expenses of administering a productive trust must be borne by the income, and the one here involved falls in the same class as insurance, taxes, interest on mortgage, repairs and other charges incidental to the management of the trust. *Bridge* v. *Bridge*, 146 Mass. 373, 376. *Parker* v. *Ames*, 121 Mass. 220. *Ogden* v. *Allen*, 225 Mass. 595, 597.

5. The next question relates to the payment of local annual taxes and of the inheritance taxes. It has been decided in *Parkhurst* v. *Treasurer & Receiver General*, *post*, 196, that the World Peace Foundation is a charity and hence not liable to an inheritance tax. That subject, therefore, is eliminated. If the investments of the trust fund are subject to annual taxes, these are to be paid as a part of the expenses of the trust and are to be deducted before the net income can be ascertained. *Holmes* v. *Taber*, 9 Allen, 246. *Plympton* v. *Boston Dispensary*, 106 Mass. 544, 547.

6. The sixth request for instructions is whether there shall be deducted from the several annuities the amount of Massachusetts inheritance taxes and other taxes assessed thereon. So far as concerns the inheritance tax of this Commonwealth the answer is found in St. 1912, c. 678, § 1, as amended by St. 1913, c. 498, which, referring to the inheritance tax, provides that "All taxes under this act shall be paid out of and chargeable to capital and not income, unless otherwise provided in a will . . . or other instrument creating the grant or gift." This modifies the rule established by *Minot* v. *Winthrop*, 162 Mass. 113, 126, that the inheritance tax under the statute then in force was payable out of the annuity. Manifestly there is no other provision in the instant will. As then there is no sequestration of any part of the general

trust fund, but it is held as a unit, these taxes must be paid out of it as the capital fund. It is the only "capital" out of which such taxes can be paid. The other taxes assessed against the annuities are to be borne by and paid out of the annuities upon which they are levied. That is the general rule. *Sohier* v. *Eldredge*, 103 Mass. 345. There is nothing in this will which shows a determination that the annuities shall be paid in full free from all tax. The expression toward the end of article fifteen, clause fifteen, to the effect that if his estate is too small to meet all the benefactions of his will, "then I expressly provide that all the gifts and annuities provided in this Will, down to and including paragraph XV (9), shall be paid in full before any payment shall be made under paragraph XV (11) to the World Peace Foundation," does not mean in its context and under all the circumstances that they are to be paid free of taxes. The contingency upon which those words were to become effective has not arisen. There is nothing in *Brimblecom* v. *Haven*, 12 Cush. 511, at variance with this conclusion.

To prevent misconception it should be added that the trustees cannot request instructions as to payments made by the executors for taxes or otherwise and allowed in their accounts. What has been said pertains only to present and future difficulties confronting the trustees in the performance of their duties.

7. The seventh request relates to deduction from income, capital or otherwise of the amount of taxes upon the interest of the World Peace Foundation under the will in property of the testator situated in the State of Minnesota "paid by the executors, and charged by said executors against capital of the estate, and no part thereof against income." It does not appear that the trustees have paid or been asked to pay this tax. Having been paid by the executors, it was a proper subject for accounting by them. Already the executors have filed at least one account, which has been allowed. The fund out of which these taxes were payable is a matter to be settled on the account of the persons who rightly paid the taxes out of properties in their hands. The trustees have received simply the residue of the estate. Their responsibility begins and ends with the administration of that residue. It is not perceived that on the present record the trustees now have a right to request instructions upon this point. *Hill* v. *Moors*, 224 Mass. 163, and cases cited.

8. The next request for instruction has a double aspect. The

first is whether the annuities are a charge upon both principal and income. That part of the question does not appear to be material in the present state of the trust. But it is apparent from the final sentence of article fifteen that in substance the testator intended that the annuities to his family should be preferred to all other legacies in case of a deficiency, and in case of necessity should be a charge upon both principal and income. The second aspect of this inquiry is whether a fund is to be erected for the support of the annuities. Many of the reasons stated in answering the first inquiry are equally pertinent and decisive as to this. It is the plain purpose of the testator that the entire trust fund treated as a unit is to support the payment of the annuities and that there is to be no division of it for the purpose of establishing separate funds. He thereby avoided a multiplication of the difficulties illustrated by *Welch* v. *Hill*, 218 Mass. 327.

9. The ninth request seeks instruction as to the duty of the trustees respecting the shares of Ginn and Company referred to in article fifteen, clause eight, to be kept available for the two sons of the testator. The framework of that clause in connection with the rest of the article does not disclose a fixed purpose on the part of the testator that these shares should be set apart and held separate and distinct from the rest of the fund. The administration of the trust fund as a single entity will enable the trustees to be in a position at all times during the effective life of this clause to comply with that part of the will if and when the conditions precedent arise which would call it into operation. The provisions of that clause are wholly contingent and there is no occasion for special activity respecting them until these contingencies shall come into existence. The reasons already stated lead to the conclusion that no separation of this part of the fund is required.

10. The tenth request relates also to clause eight for the benefit of the sons and has regard to the income which in a contingency may be payable to one or both of them. No facts are set out which make it a present obligation on the part of the trustees to put apart any income for this purpose. *Hall* v. *Cogswell*, 183 Mass. 521, 523. A broad discretion as to management of the trust is vested in the trustees and with that the court upon this record would not undertake to interfere. See *Leverett* v. *Barnwell*, 214 Mass. 105, 108, and *Cummings* v. *Cummings*, 146 Mass. 501.

11. The petitioners request instructions whether any amount is now payable to the World Peace Foundation from accumulated income in their possession, in order to bring the payments for each of the two years 1914 and 1915 up to $40,000. They already have paid to that institution "the income, as nearly as it could be reckoned" for those two years, "from that part of the total estate represented by the ratio of $800,000 to the whole estate, including all classes of property comprising the same, except the homestead." As already has been pointed out, this is the extent of the gift under the will to the World Peace Foundation in this particular. There is no provision for making up a deficiency in one year out of the excess of another year.

12. The twelfth and thirteenth requests ask for instruction as to the disposition of the undistributed cash principal now in their hands, amounting to about $110,000. The answer depends upon the meaning of article fifteen, clause thirteen, as modified by the codicil. Its material terms are, "If and when (after the payment of the foregoing gifts and legacies and the reserve of sufficient trust funds to provide for outstanding annuities and other gifts of income, absolute and contingent), principal of my estate becomes available for distribution, I authorize and instruct my Trustees to make gifts and to dispose of such principal as follows:" Then ensue gifts of $10,000 each to Tufts College, Westbrook Seminary, and Ingleside Home, and one for $5,000 to Mrs. Plummer in "recognition of what she has for a long time been doing for the Ingleside Home, practically without compensation," and the testator's "belief that it is just and wise" that this sum originally intended for the Home itself "should go to her in recognition of and some sort of compensation for what she has done, is doing, and will probably continue to do for this institution." A further contingent gift of $15,000 is made to the Home, payable within three years after the first. The aggregate of these gifts presently payable is $35,000 and the possible maximum of $50,000 is not a large sum when compared with the entire trust fund. Although nothing more appears respecting Mrs. Plummer than here stated, it is plain that the purpose of the testator was to give to her something to add to her enjoyment of life and not merely to constitute a fund for the benefit of her heirs or legatees. The testator was a graduate of Tufts College. The crucial words of gift so far as con-

cerns time are in effect that these legacies shall be payable only after there is an adequate reserve to support the payment of all annuities and gifts of income. The real question then is whether there is now such reserve. If these legacies all should be paid, the trust fund still would slightly exceed $2,000,000. Of this sum more than $200,000 consists of real estate which doubtless will be sold within a reasonable time and be added to the productive property of the fund. The annual income is more than $100,000 per year. A purchase of annuities out of the trust fund sufficient to meet the requirements of the will would leave in that fund more than the $800,000, whose income to the extent of $40,000 is demanded for the support of the World Peace Foundation. Under these and all the other circumstances appearing on the record, we are of opinion that the time has arrived for the payment of the legacies given by clause thirteen and that they should not longer be withheld.

It is the settled rule that "Interest is payable upon pecuniary legacies from the time when, by the terms of the will or by the rules of law, they become due and ought to be paid." *Kent* v. *Dunham*, 106 Mass. 586, 590. These legacies are not payable at a fixed calendar date either by the will or by the law. They become due only upon the happening of the contingency that principal of the estate becomes available therefor after satisfying all prior legacies absolute and contingent. That event happened according to the present decision upon the facts here disclosed on April 11, 1916. It cannot be said to have occurred earlier than that date. The absolute legacies of $35,000, therefore, bear interest at the rate of four per cent per annum since that date. St. 1915, c. 151, § 2.

13. The instruction to be given in reply to the fourteenth and fifteenth requests depends upon the point whether any part of the final residue of the estate is now payable under article fifteen, clause fourteen. That is a true residuary clause. While it well may be that, if there should be a considerable increase in the annual income of the fund as compared with the charges against it, a time may come for a single or several partial distributions of this residue, it cannot be said that such time has yet arrived. A large part of the fund is bound up in the fortunes of a single business adventure, which apparently has been prosperous for many years. But it is plain, also, that the testator was solicitous that the

support of his family and the World Peace Foundation should be as certain as human foresight could make it, and not subject to any vicissitudes. A good margin of safety should be preserved at all times in the principal of the fund, so that these beneficiaries may receive a constant income. Much must be left to the sound business judgment of the trustees in deciding upon a time when it will be safe to make a partial distribution of the residue and still retain enough to satisfy all the other requirements of the will with a fair margin of safety. It follows that the trustees should retain for the time being as a part of the capital of the fund the balance of the accumulated cash, whether of principal or income.

14. Instruction is requested whether the trustees have power to invest and reinvest the trust fund. It is plain that this power is conferred upon them by implication, although not in express terms. The testator knew and had in mind the fact that his investments could not always continue the same, as appears from several terms of the will. The active duty of securing income sufficient to meet the various obligations as to annuities and otherwise rests upon the trustees. By necessity they are clothed with the power and charged with the duty to invest and keep safely and productively invested the funds of this trust, in such property and securities as are recognized as appropriate for trust funds, or are authorized by the will. *Jones* v. *Atchison, Topeka, & Santa Fe Railroad*, 150 Mass. 304, 308. *Smith* v. *Haynes*, 202 Mass. 531, 535. *Dickinson, appellant*, 152 Mass. 184, 186.

15. The final request is for instruction as to the nature of the gifts to Marguerita Ginn and Edwin Ginn, children of the testator, under article fifteen, clause five. It is not necessary to recite this clause at length, because it is clear from its terms that the gift intended is for the life of each and for no less period. The power conferred upon the trustees to withhold payment ceases when each reaches the age of twenty-eight years. But the annuity continues during life so far as necessary, together with the income due each from the Beacon Trust, to make up an annuity of $4,000 for each.

Decree accordingly.

JAMESTOWN PORTLAND CEMENT CORPORATION & others *vs.* FRANCIS T. BOWLES & others.

JOHN F. BRAUN *vs.* SAME.

Suffolk. March 26, 1917. — September 13, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Contract, What constitutes. *Equity Jurisdiction*, To compel specific performance of contract.

The signing of an agreement in writing to subscribe for the shares of a proposed Massachusetts corporation, which refers to a prospectus, in which it is stated that counsel advise that a new corporation be formed to take over the property of a certain Virginia corporation and there follows an outline of the proposed capitalization of the new Massachusetts corporation and a statement of the terms on which stockholders in the Virginia corporation may exchange their shares for shares in the new Massachusetts corporation, does not create a contract of the subscribers with the Virginia corporation or with any of its stockholders.

Negotiations, proposals or schemes, which do not possess the essential elements of a completed contract, cannot be enforced in equity by a bill for specific performance. Nothing short of a completed contract can be made the foundation of such a bill.

TWO BILLS IN EQUITY, filed in the Supreme Judicial Court on June 22, 1915, and November 2, 1915, the first by the Jamestown Portland Cement Corporation, a corporation organized under the laws of the State of Virginia and by four individuals, alleged to be a "stockholders' committee" of that corporation, and the second by the first named member of such stockholders' committee, to enforce the specific performance of an alleged contract of the defendants to take and pay for the shares of a Massachusetts corporation called the Yorktown Cement Corporation and thereafter to carry out a reorganization plan for the purchase of the property of the plaintiff corporation.

The subscription agreement alleged to have been signed by the defendants was as follows:

"Yorktown Cement Corporation
Subscription Agreement.

"We, the undersigned, hereby severally agree each with the other, in consideration of the mutual agreements herein contained to take the number of shares of preferred and common stock re-

spectively of the Yorktown Cement Corporation (a proposed Massachusetts corporation) hereinafter set opposite our respective names and to pay for the same to, and upon demand of George Linder, who will act as temporary treasurer, the sum of $90.00 for each such share of preferred stock (par $100.00) and the sum of $5.00 for each such share of common stock (par $5.00). The said stock is to be a part of the issue referred to in a certain prospectus dated October 15, 1911, and signed by Francis T. Bowles, and is to be issued substantially upon the conditions therein specified, with the additional condition, however, that the preferred stock is to be subject to purchase or redemption on or after January 1st, 1917, at the price of $110.00 per $100.00 share.

"The subscriptions hereto shall be binding only when subscriptions to said stock shall have been obtained amounting in the aggregate to the sum of $950,000.00.

Name of Subscriber.	Number of Shares Preferred.	Number of Shares Common.	Total Cash Subscription."

The portion of the prospectus signed by Francis T. Bowles referred to above was as follows:

"New Company
Yorktown Cement Corporation.

"Counsel advise as the best method that a new corporation be formed to take over the property of the present corporation and receive the new money.

"Those named below have agreed to become Directors of the new Company:

"The new corporation will be organized under the laws of Massachusetts, will be named the Yorktown Cement Corporation, and will provide for a capital stock of $2,100,000.00; $2,000,000 — 7 per cent. cumulative stock, par value of $100.00 per share, 20,000 shares of common stock, par value of $5.00. Each stockholder in the old company will receive for one share of preferred with its accumulated dividends one share of the new preferred; for each two shares of founders stock which they hold they will be permitted to subscribe for one share of the new common in cash at $5.00. It is proposed to raise $950,000.00 cash by the sale of $1,000,000.00 preferred at 90, each share carrying with it the right

to subscribe to one share of common stock at $5.00. With the funds to be raised there will be an expenditure of $600,000.00 for a cement works capable of producing 800,000 barrels of cement annually; $50,000.00 to close up existing indebtedness on the Yorktown property and the balance, $300,000.00, working capital. There will remain in the treasury of the new company 5080 shares of preferred stock and approximately 4400 shares of common stock."

The defendants demurred to the bills and the cases were heard together on the demurrers by *Pierce*, J., who was of opinion that the demurrers should be sustained and ordered that decrees be entered that the bills be dismissed. By agreement of the parties the single justice reported the cases for determination by the full court.

G. W. Anderson, for the plaintiffs.

H. R. Bailey, for the Yorktown Cement Corporation.

S. H. Pillsbury, (*P. G. Carleton* with him,) for the defendants Bowles and others.

G. G. Bacon, (*W. B. Farr & A. J. Santry* with him,) for the defendant Gaston.

RUGG, C. J. These are suits in equity for the specific performance of an alleged contract. The first is brought by the Jamestown Portland Cement Corporation, a Virginia corporation, and four individuals in their capacity as a committee acting for certain stockholders in that corporation against the individual defendants as subscribers to an agreement to take stock in a proposed Massachusetts corporation and against that corporation, called the Yorktown Cement Corporation. The material averments are that the plaintiff corporation owned valuable marl and clay lands in Virginia, but was in financial difficulties. The defendant Bowles made an examination of the property and issued a prospectus according to which it seemed that these lands were capable of profitable development for the manufacture of cement. A subscription agreement was prepared, which the defendants signed, wherein they severally agreed each with the other, in consideration of the mutual agreements therein contained, to take the number of shares of preferred and common stock respectively of the Yorktown Cement Corporation (a proposed Massachusetts corporation) set opposite their respective names and to pay therefor according

to terms stated. It was recited that the stock was to be a part of the issue referred to in the Bowles prospectus, and to be issued substantially upon the terms therein specified. That prospectus contained a description of the property and capitalization of the plaintiff corporation, and a statement that counsel advise that "a new corporation be formed to take over the property of the present [that is the plaintiff] corporation and receive the new money." This was followed by an outline of the proposed capitalization of the new Massachusetts corporation, the terms upon which stockholders in the old corporation might exchange that stock for stock in the new corporation, and the amounts of stock proposed to be sold for cash and to be kept in the treasury.

Signature to this subscription agreement and the payment to a designated individual of a percentage upon their subscriptions (subsequently returned to the subscribers after deduction of expenses), together with the facts that that agreement was circulated for the purpose of securing subscriptions, that it was oversubscribed, and that information to this effect was communicated to the plaintiff corporation, are the grounds of the alleged liability of the defendants.

The bill avers that these facts constituted "an offer by and from said syndicate subscribers to the plaintiff corporation and its stockholders for a purchase, sale and reorganization by the syndicate subscribers in accordance with the plan outlined." The acceptance of the offer is alleged to have taken place, through a vote of the directors of the plaintiff corporation "to accept, so far as they then had authority to accept," and through the organization of a committee of the stockholders of the plaintiff corporation and a deposit of a large part of such stock with a depository with powers to complete the alleged agreement.

These allegations fall far short of setting out a binding contract on the part of the defendants as subscribers of the subscription agreement with the plaintiffs or any of them. There was no offer on the part of the subscribers addressed directly or indirectly to the plaintiffs. Manifestly the basis of the whole scheme was the land owned by the plaintiff corporation. But no obligation to buy it is set forth in the terms of the subscription agreement. No price is fixed. No terms of payment are stated. No proposal is to be found in the subscription agreement on the part of the sub-

scribers to take over the property of the old corporation or the stock in it. The property was to be taken over by the proposed new corporation; but that is the only element looking in the direction of a contract between the parties to this suit which can be found in the agreement when read in connection with the prospectus. This alone without other necessary elements does not constitute a contract. The ingenious suggestion that a price for the property of the plaintiff corporation may be conjectured from the difference between the cash subscription price of shares in the new corporation and the terms upon which shareholders in the old corporation might exchange for stock in the new is in itself uncertain. Moreover, the signed documents are not reasonably susceptible of such construction. The simple matter of price in a sale is not wrapt in such obscurity in ordinary transactions.

It hardly needs to be said that business agreements are to be construed so as to carry into effect commercial transactions plainly contemplated, and that corporate forms are not permitted to be used as a fraudulent protection to wrongdoers. *Martin* v. *Meles*, 179 Mass. 114. *Sherwin* v. *Fletcher*, 168 Mass. 413. *Mills* v. *Potter*, 189 Mass. 238, 243, 244. *Athol Music Hall Co.* v. *Carey*, 116 Mass. 471. *Brightman* v. *Bates*, 175 Mass. 105. *Pennell* v. *Lothrop*, 191 Mass. 357. *J. J. McCaskill Co.* v. *United States*, 216 U. S. 504, 515. But these undoubted principles do not warrant a court in assuming a contract to exist where none can be found in the written instruments, oral negotiations and conduct of parties.

The subscription agreement with the Bowles prospectus had an important function. The two papers stated the rights and duties respecting the proposed adventure of the persons who signed. It bound them to important obligations in that regard. But it did not purport to bind them to other persons who were not parties to it, even though they ultimately might be affected by subsequent stages in the development of the plan, provided they then became subject to contractual obligations. That agreement does not constitute an offer to buy the property of the plaintiffs or any of them. Negotiations, proposals or schemes which do not possess the essential elements of a contract cannot be specifically enforced by order of a court of equity. There cannot be specific performance of anything short of a completed contract. The bargain must be determined by a meeting of minds as to the essential terms before

there can be a contract. No vital factors of it can be left to future negotiation. It must be wholly settled as to obligation and duty imposed before it can be ordered to be executed by chancery.

The bill fails to set out an enforceable contract between the plaintiffs or any of them with the defendants or any of them. Being deficient in this respect, no relief can be granted. *Fogg* v. *Price*, 145 Mass. 513, 515. *Grace* v. *Denison*, 114 Mass. 16. *Emerson* v. *Somerville*, 166 Mass. 115, 116. *Hudson Real Estate Co.* v. *Tower*, 156 Mass. 82. *Pray* v. *Clark*, 113 Mass. 283. *Domestic Telegraph & Telephone Co.* v. *Metropolitan Telephone Co.* 12 Stew. 160.

The allegations of the bill in the second suit brought by a member of the committee of stockholders of the plaintiff corporation are indistinguishable from those of the first bill in the particulars in which that has been held fatally defective.

Order in each suit dismissing bill affirmed with costs.

ALBERT LORANDO *vs.* JOSEPH C. GETHRO & another.

Suffolk. March 28, 1917 — September 13, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Insurance, Liability. *Statute*, Construction. *Constitutional Law*. *Words*, "Loss or damage," "Loss," "Occur," "Absolute."

Under the provision in St. 1914, c. 464, regulating the payment of losses under contracts for casualty insurance, that, "whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, occasioned by said casualty," a "loss occurs on account of a casualty," not when the casualty happens, but when the damages resulting from that casualty have been fixed by the judgment of a court.

In further interpretation of the same clause it was *held* that the liability of the insurance company becomes "absolute" in the sense that the amount of the loss thereafter shall not be open to dispute, and the clause does not prohibit any ground of defence that ordinarily would be open to the insurer in an action brought against it by the insured on the policy.

St. 1914, c. 464, which in substance prohibits the insertion in a contract of casualty insurance made after that statute took effect of a condition that the insured must pay the amount of the loss before liability attaches to the insurer, and which

gives to a person injured by fault of the insured in a manner covered by the policy a beneficial interest in the proceeds of the policy and permits him, after he has obtained a judgment against the insured, to maintain a suit in equity in his own name to procure the application of the insurance money to the satisfaction of his judgment, is constitutional.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 30, 1916, against Joseph C. Gethro of Norwood and the New England Equitable Insurance Company, a corporation organized under the laws of this Commonwealth engaged in the business of casualty insurance, alleging that on June 23, 1914, the defendant insurance company entered into a contract with the defendant Gethro by which it insured him in the sum of $5,000 against loss or damage on account of bodily injury or death by accident of any person for which he would be responsible by reason of the operation of a motor car of which he was the owner, that on July 4, 1914, the plaintiff received severe bodily injury by reason of the negligence of the defendant Gethro in the operation of his motor car and brought an action against that defendant in which he recovered judgment against him in the sum of $6,862.33 damages and $78.40 costs, that this judgment was not satisfied in whole or in part by the defendant Gethro out of his insurance for the sum of $5,000 with the defendant insurance company or otherwise, and that under St. 1914, c. 464, the plaintiff was entitled to have the insurance money applied to the satisfaction of his judgment. The prayer of the bill was that the defendant insurance company might be ordered to pay to the plaintiff the sum of $5,000 so far as might be necessary for the satisfaction of the plaintiff's judgment against the defendant Gethro.

The defendants demurred to the bill, assigning as causes of demurrer the following:

"1. That the statute under which recovery from the defendants or either of them is sought is unconstitutional, and therefore the plaintiff sets up no cause of action cognizable in law or equity.

"2. That the matters set forth in the bill of complaint are insufficient in law to enable the plaintiff to maintain his action, either in law or in equity."

The case was heard upon the demurrer by *Pierce*, J., who ordered that the demurrer be overruled and, at the request of the defendants, reported his ruling for determination by the full court,

such orders or decrees to be entered as equity and justice might require.

St. 1914, c. 464, is entitled "An Act to regulate the payment of losses under contracts for casualty insurance," and is as follows:

"Section 1. In respect to every contract of insurance made between an insurance company and any person, firm or corporation, by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, occasioned by said casualty. No such contract of insurance shall be cancelled or annulled by any agreement between the insurance company and the assured after the said assured has become responsible for such loss or damage, and any such cancellation or annulment shall be void.

"Section 2. Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment."

The act was approved on May 2, 1914.

R. H. Willard & W. H. Taylor, for the defendants, submitted a brief.

A. T. Smith, for the plaintiff.

RUGG, C. J. This is a suit in equity under St. 1914, c. 464, brought by one who has recovered judgment against the principal defendant for bodily injuries caused by his negligence and against an insurance company which had insured the principal

defendant against loss or damage arising from such cause by a policy dated subsequent to the time when the statute became effective. The defendants demurred to the bill on the ground that the statute is unconstitutional. The statute is printed on page 183.

The phraseology of this statute is somewhat involved. The words "loss or damage" are found four times in § 1 and twice in § 2. The first time these words occur, manifestly they refer to the subject matter of the contract of insurance, namely, the loss or damage which the assured ultimately may suffer through paying or being liable to pay the amount recovered for the bodily injuries or death by accident caused by him to others. The second, third and fourth times these words are used they refer equally plainly to the "bodily injury or death by accident of any person" for which the insured legally may be responsible. The tautological addition of the words "or death" in connection with their use the third time does not affect their sense. Clearly a like meaning attaches to them at their first occurrence in § 2. At their second appearance in that section, they refer to the loss or damage suffered by the insured, and this is so notwithstanding the circumstance that they are preceded immediately by the word "said," which at first would seem to make them synonymous with the first "loss or damage" in that section. The word "loss" alone without other connected or modifying word occurs twice in the first section. It refers in each instance to the detriment caused to the insured, for which he is to be indemnified by the insurer.

Indubitably "loss" as thus used does not refer to the event out of which as a consequence the pecuniary liability of the insured flows. A "loss occurs on account of a casualty" as the words here are used, not when the casualty happens, but when the damages resulting from that casualty have been fixed in any legal way. "Loss" in this connection means the actual financial obligation of the insured, measured in money, in respect of the casualty against which he is insured. Ordinarily in cases of dispute that loss can be ascertained only by the judgment of a court. It can "occur" in the sense of the statute only when so ascertained.

The clause following, namely, "the liability of the insurance company shall become absolute," in its context, means only that the liability of the insurance company, so far as concerns the amount of the loss, shall not thereafter be open to dispute. The insurer's lia-

bility is absolute only in respect of the amount of the loss and not in other respects.

This clause thus interpreted is or might be of great force in cases of bankruptcy or financial irresponsibility of the insured. It fixes the amount of loss for which the insured has been found liable, not exceeding the extent of the insurance, rather than the financial loss actually sustained by him through payment of money damages, as the measure of the insurer's liability. In many conceivable instances this distinction might be exceedingly important. Perhaps the clause thus interpreted adds little or nothing to what might be implied from the ordinary contract of insurance between abundantly solvent parties. But that matter is not left hereafter to be the subject of contract between the parties. It is definitely established as the relation imposed by law upon the parties. Whatever may be their degree of financial responsibility, the clause does not mean that the other valid conditions of a contract of casualty insurance are abrogated. Whatever conditions are imposed by that contract, whether as to written notice by the insured to the insurer of any accident and claim, the delivery to the insurer of summons in case of action instituted, as to time of bringing action on the policy, or otherwise, are left in full force, unaffected by this clause.

This clause also leaves open for determination the question whether the policy of insurance covers the casualty in issue, or whether otherwise the insurer is liable to the assured. It does not prohibit any ground of defence which ordinarily would be open to an insurer in an action brought against it by the insured on the policy. It forecloses only the ground that the amount of the loss shall not be open to dispute. As to that subject it provides that the "loss," as that word is used in contracts of casualty insurance, shall mean loss as we have defined it, and that its meaning in that respect shall not be modified, affected or limited by stipulations between the parties.

The contention is untenable that the words "the liability of the insurance company shall become absolute" mean that the insurance company thereafter shall have no ground of defence open to it. It is almost inconceivable that the Legislature would attempt to make an insurance company unconditionally liable to pay for a loss without giving it an opportunity to require any notices of

loss or of actions at law and thus to ascertain the circumstances out of which the loss arises and its nature and extent at or near the time when the event occurs, or to make reasonable conditions as to the establishment of its liability under the insurance contract. Such an intent on the part of the General Court could not be inferred in the absence of unequivocal words expressing that purpose so clearly as to be beyond discussion. A statute of such import would present a constitutional question quite different from those now at the bar. It would require unmistakable words to warrant the supposition that the Legislature had pressed its power to such an extreme. The instant statute conveys no such meaning. All its words may be given an effective and natural interpretation without reaching so unusual a result.

The statute then provides that the payment of the "loss" as thus defined by the insurer to the insured shall not depend upon the satisfaction by the latter of final judgment against him founded on the casualty against which he was insured. The meaning of this clause is plain. As matter of construction its effect is to nullify "Condition 7" of the present policy of insurance, namely, that "No action shall lie against the Company to recover for any loss . . . unless . . . for loss or expense actually sustained and paid in money by the Assured in satisfaction of a final judgment." Its design obviously is to prevent the enforcement of such and like conditions, which were held valid in *Connolly* v. *Bolster*, 187 Mass. 266, and in *Davison* v. *Maryland Casualty Co.* 197 Mass. 167, 170, and which, unless prohibited by law, indisputably are binding terms of a contract. By the express provision of this statute such conditions are to be of no effect.

The final sentence of § 1 prohibits the cancellation or annulment of a policy of casualty insurance by agreement between the insured and the insurer after a casualty has occurred, for which the insured is liable, and against the damage accruing from which to him he is insured by the policy, without the assent of the person injured by the casualty. It is not a dominant provision, but is ancillary to the main purpose of the act.

The second section establishes a temporary lien in favor of one, who has put the damages, resulting to him from the casualty insured against, in the form of a judgment, on the amount due under the policy as between the insured and the insurer. It also affords

him the usual remedies of a judgment creditor, *Rioux* v. *Cronin*, 222 Mass. 131, or the special equitable attachment provided by R. L. c. 159, § 3, cl. 7.

The Legislature has power under the Constitution to enact the statute as thus interpreted. Said Chief Justice Knowlton in *New York Life Ins. Co.* v. *Hardison*, 199 Mass. 190, 198, "The Legislature has large powers for the regulation of the business of insurance. It may act under the police power for the protection of the public, or it may act as the creator and controller of corporations, domestic and foreign, which are subject to this power. This has been decided in many cases in this Commonwealth and elsewhere." A number of decisions there are collected. It was held in *Considine* v. *Metropolitan Life Ins. Co.* 165 Mass. 462, 466, that there is "no doubt of the constitutional power of the Legislature to prescribe the form of a policy of insurance." To the same effect in substance are *Knights Templars' & Masons' Life Indemnity Co.* v. *Jarman*, 187 U. S. 197, 204, and *Whitfield* v. *Aetna Life Ins. Co.* 205 U. S. 489, 495.

The instant statute has for its chief object simply a regulation as to the form of a policy of insurance. It prohibits in substance the insertion in any contract for casualty insurance of a condition that the insured must actually pay the loss before liability attaches to the insurer. With that single exception and its accompanying incidents the insurer and the insured are free to make such contracts as they choose, and the scope and validity of such contracts are left as before, unaffected by this statute.

A further important feature of the statute is to give to the person injured by the conduct, against loss from which the assured is insured by his policy of insurance, a certain beneficial interest in the proceeds of that policy. It does not enlarge nor modify in any respect the substantial liability created by the contract of insurance. It merely enables the person suffering the initial damages, out of which grows the loss to the insured, to acquire a lien against the loss and the right to damages or indemnity arising under the policy and to enforce it in his own name. In a constitutional sense this phase of the statute does not differ from many others which have been upheld. When a statute is in force, giving special force and effect to a particular contract, parties who enter into such a contract are held to contemplate and assent to the

force and effect attributed to it by such statute. The instant statute is similar in this aspect to St. 1907, c. 576, § 73, whereby there is given to a beneficiary under life insurance policies a vested interest and right of direct action on the contract of insurance against the insurer, though no party to it, *Dean* v. *American Legion of Honor*, 156 Mass. 435, *Blinn* v. *Dame*, 207 Mass. 159, 163, to St. 1911, c. 751, Part III, § 17, whereby the employee of a subcontractor of a subscriber is entitled to the rights of an employee of the subscriber although having no relations to him, *White* v. *George A. Fuller Co.* 226 Mass. 1, and to the numerous lien statutes whereby rights are given to laborers and to materialmen who have no contractual or other direct relation to the landowner against whom they are given a right of action. *Parker* v. *Bell*, 7 Gray, 429, *Bowen* v. *Phinney*, 162 Mass. 593.

In its practical operation in this respect the statute is not altogether unlike the enforcement of an agreement or covenant merely personal in its nature, not purporting to bind assignees and not running with land, by and against those not parties thereto by means of the doctrine of equitable restrictions. *Whitney* v. *Union Railway*, 11 Gray, 359, 363. *Bailey* v. *Agawam National Bank*, 190 Mass. 20. *Childs* v. *Boston & Maine Railroad*, 213 Mass. 91.

No constitutional right of the insurer or of the insured is violated by enabling one, who has recovered a judgment against the latter on a liability, against loss from which he is protected by contract with the insurer, to bring a suit in his own name. Such a judgment creditor has a direct interest in the performance of the undertakings in the contract of casualty insurance. It may be that the only source from which his debtor can secure money enough to pay his judgment will be from the proceeds of that insurance contract. See *German Alliance Ins. Co.* v. *Home Water Supply Co.* 226 U. S. 220, 230.

The subject of insurance is of such general public interest as to be under the control of the Legislature within rational limits. When a statute has been enacted governing any particular part of the field of insurance, the parties entering into contracts respecting that field are presumed to do so with reference to the obligations and terms established by that statute. Although previous to the passage of the statute now attacked, a contract of insurance like that here in question would have been valid and enforceable under

Connolly v. *Bolster, ubi supra,* yet now the insurer, by issuing a policy of casualty insurance, impliedly agrees to be governed by the terms of the statute and to consent that his obligation to the insured shall, to the extent of a judgment recovered by a third person against the assured for a casualty covered by the insurance, be hypothecated for the benefit of such third person.

The statute is reasonable in its purpose and effect. Its obvious design is to afford to the insured of modest resources the direct benefit of his insurance. It well might be a practical impossibility for an insured who has complied with every other term of his contract and has paid all premiums demanded by the insurer, first to pay the loss and damage for which he was liable and against which he was insured. The man without capital or credit might be powerless to meet his obligation and put himself in position to recover against the insurer. The man of slender resources or doing a considerable business on small capital might be forced into bankruptcy, and get little or no benefit from the insurance for which he had paid. The persons injured by accidents, for which such classes of persons insured might be liable, would be in effect remediless as to practical results for the damages sustained by them. It well might be thought by the Legislature a sound public policy that casualty insurance should become an effective instrumentality for both the insured and the injured, and not be a snare to the insured and a barren hope to the injured. If the Legislature believed this, it reasonably might decide to frame the terms of policies of casualty insurance and to provide means for their enforcement, to the end that these results might be avoided, and to declare that policies lacking these requisites should not be written, or if written should be ineffective as to these terms.

When confessedly the general subject of insurance is under legislative control, there is a broad latitude of choice as to the means which may be employed to reach results thought to be desirable.

The principle here declared and the decisions upon which it rests do not derogate in any degree from the right of freedom of reasonable contract and the right to acquire and possess property which are among the essential guarantees of our Constitution. They do not infringe upon the principles declared in numerous cases sustaining such rights illustrated by *Commonwealth* v. *Perry,*

155 Mass. 117, and *Bogni* v. *Perotti*, 224 Mass. 152, and the cases there collected.

Of course the Legislature cannot create a debt out of hand from one person to another without the express or implied consent of the person to be charged. But it is a very different thing to enact a statute to take effect as to contracts thereafter made. *Hanscom* v. *Malden & Melrose Gas Light Co.* 220 Mass. 1.

Perhaps there are decisions upon kindred subjects, the grounds for which are equally applicable to the case at bar, and the principles of which rationally extended would require the conclusion that this statute violates the constitutional right of freedom of contract. *Rittenhouse & Embree Co.* v. *Warren Construction Co.* 264 Ill. 619. *Young* v. *Lion Hardware Co.* 55 Ohio St. 423. But these adjudications seem to restrict unduly the power of the Legislature to pass all manner of reasonable and wholesome laws and to be contrary to the great weight of authority. See *Jones* v. *Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 115, 127, for an exhaustive review of cases where "reasons . . . are cogently stated in the able and elaborate opinion of Judge Lurton," which were adopted by reference without repetition in *Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 532, 550.

No discussion is required to demonstrate that the Legislature may establish appropriate forms of relief for existing rights or those rightly created, and that it may provide equitable procedure for the enforcement or protection of such rights. *Stockbridge* v. *Mixer*, 215 Mass. 415. *Gould's Case*, 215 Mass. 480.

The instant statute is a declaration of public policy by the General Court respecting one aspect of casualty insurance. It is a declaration as to a subject within its general power of regulation. It governs contracts made after it took effect. It is not retroactive. Its terms are reasonable and violate no right secured by the Constitution. It is well within the principle of numerous decisions where statutes more or less interfering with the freedom of contract have been upheld. *Mutual Loan Co.* v. *Martell*, 200 Mass. 482, affirmed in 222 U. S. 225. *Dewey* v. *Richardson*, 206 Mass. 430. *Commonwealth* v. *Strauss*, 191 Mass. 545. *Commonwealth* v. *Libbey*, 216 Mass. 356. *John P. Squire & Co.* v. *Tellier*, 185 Mass. 18.

Order overruling demurrer affirmed.

ROSE WILLIAMS *vs.* JAMES E. NELSON & another.
BARNETT WILLIAMS *vs.* SAME.

Suffolk. March 28, 1917. — September 13, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Insurance, Liability. *Constitutional Law. Superior Court. Equity Jurisdiction*, To reach and apply casualty insurance to satisfaction of judgment for bodily injury or death. *Supreme Judicial Court. Motor Vehicle. Words*, "Driven or manipulated," "Loss or damage," "Bodily injury."

St. 1914, c. 464, is constitutional. Following *Lorando* v. *Gethro*, *ante*, 181.

The Superior Court, under its general chancery jurisdiction, including creditors' bills to enforce the collection of judgments, and under R. L. c. 159, § 3, has jurisdiction of suits in equity brought under St. 1914, c. 464, by those who have obtained judgments for bodily injury or death by accident against defendants who were insured against such loss or damage when the right of action arose, to reach and apply the insurance money to the satisfaction of such judgments.

The exclusive jurisdiction in equity conferred upon the Supreme Judicial Court by R. L. c. 159, § 2, is confined to matters not within the general principles of chancery jurisdiction and cognizable under statutes which do not provide expressly that the Superior Court also shall have jurisdiction.

In a suit in equity under St. 1914, c. 464, to reach and apply the money recoverable under a policy of casualty insurance to the satisfaction of a judgment obtained by the plaintiff against the insured for injuries sustained by being hit by an automobile of the insured, it appeared that the policy contained the following clause: "This policy does not cover loss from liability for, or any suit based on, injuries or death caused by any automobile (1) while driven or manipulated by any person under the age fixed by law or under the age of sixteen years in any event." It appeared also that up to a short time before the plaintiff was injured the automobile of the insured was being driven by a son of the insured less than sixteen years of age, the insured sitting by his side, that the father "suddenly leaned over to the left and took the wheel from his son, telling him to get out of the way," that "the son shrunk back in the seat, and the father thereafter guided the course of the automobile and entirely controlled its operation so far as possible so to do in the position in which he was, and the son thereafter did nothing except to blow the horn," that under those conditions the automobile crossed parallel street railway tracks, passed in front of a street railway car, and then, turning to the right, proceeded between the street railway car and the sidewalk and ran into the plaintiff, who was standing on the street for the purpose of taking the car. The trial judge found that the insured "was not in a position in the automobile at the time of the accident so that he could properly drive or manipulate the automobile, and he was not in a position in which he could readily prevent the accident by applying the levers or pedals provided for stopping the automobile." *Held*, that a finding was warranted that at the time of the plaintiff's injury the automobile was "driven or manipulated," within the meaning of those words in the policy, by the insured and not by his son.

In the same suit it was *held* that the case was one within St. 1914, c. 464, which is applicable to every contract of insurance whereby one "is insured against loss or damage on account of the bodily injury or death by accident of any person," the words "loss or damage" including a case where the insured has been held responsible to the extent of the rendition of a judgment against him, although no payment has been made on the judgment.

The words of St. 1914, c. 464, quoted above do not include "loss or damage" suffered by a husband by reason of the physical injury of his wife, such consequential financial loss not being a "bodily injury" within the meaning of the statute.

TWO BILLS IN EQUITY, filed in the Superior Court on September 5, 1916, the first by Rose Williams, and the second by Barnett Williams, her husband, the plaintiffs respectively having recovered judgments against the defendant Nelson for bodily injuries to the plaintiff Rose and alleged loss or damage arising therefrom, seeking under St. 1914, c. 464, to have the insurance money under a policy of casualty insurance issued to the defendant Nelson by the defendant United States Fidelity and Guaranty Company applied to the satisfaction of the said judgments.

The suits were heard together by *Jenney*, J. The material findings of the judge are stated in the opinion. The defendant insurance company asked the judge to make the following findings:

"1. The defendant requests that the court shall find that at the time of the accident the automobile was being driven or manipulated by James H. Nelson, a minor under the age of sixteen years.

"2. The conditions precedent of the policy have not been complied with or satisfied.

"3. James E. Nelson was not in a position in the automobile at the time of the accident so that he could have prevented the accident by applying the levers or pedals provided for stopping the automobile.

"4. James E. Nelson was not in a position in the automobile at the time of the accident so that he could properly drive or manipulate the automobile."

The judge stated that he had made the fourth finding requested and had made the third in substance. The first and second requests he refused. He ordered that a decree should be entered directing the defendant insurance company to pay to the plaintiff Rose Williams the amount of the judgment in her favor with interest, and that a similar decree should be entered in the suit of Barnett Williams.

Later by order of the judge final decrees were entered in accordance with the findings and orders made by him. The defendant insurance company appealed, the evidence being reported as taken by a commissioner appointed under Equity Rule 35.

R. L. c. 159, § 2, is as follows: "The Supreme Judicial Court shall have original and exclusive jurisdiction in equity of all cases and matters of equity which are cognizable under the provisions of any statute and are not within the jurisdiction conferred by the provisions of the preceding section, unless a different provision is made; and the Superior Court shall have like original and exclusive, or like original and concurrent, jurisdiction only if the statute so provides."

H. V. Cunningham, (*F. M. Murphy* with him,) for the defendant insurance company.

C. R. Cabot, (*J. E. Hannigan* with him,) for the plaintiffs.

RUGG, C. J. These are suits in equity under St. 1914, c. 464. That act in terms permits a judgment creditor of one insured by contract of casualty insurance against loss or damage on account of bodily injury or death by accident of any person arising from causes for which the insured is responsible, such judgment having been recovered for a cause covered by the contract of insurance, to proceed in equity against the insured and the insurer to reach and apply the insurance money to the satisfaction of the judgment.

1. The statute has been assailed as contrary to the Constitution. But that contention has been held untenable in *Lorando* v. *Gethro*, *ante*, 181, just decided, and need not be discussed further. This case upon that point is governed by the authority of that decision.

2. The Superior Court has jurisdiction of the suits. That court has general chancery jurisdiction. It has jurisdiction by the express terms of R. L. c. 159, § 3, of special equitable suits by creditors to reach and apply property of a debtor which cannot be reached to be attached or taken on execution in actions at law. Creditors' bills brought by those who have obtained judgments to enforce their collection is a well recognized branch of equity. *Rioux* v. *Cronin*, 222 Mass. 131, 137. Suits under the present statute are sufficiently similar to these two classes of cases, of which the Superior Court plainly has jurisdiction, to be also within its jurisdiction. When an existing method of relief in equity already within the jurisdiction of the Superior Court is enlarged or

modified, without creating a new branch of equity, it is cognizable still by that court. The instant statute is a simple amplification of relief under the well known equitable process of creditor's bill or equitable attachment.

The exclusive jurisdiction in equity conferred upon the Supreme Judicial Court by R. L. c. 159, § 2, is confined to matters not within the general principles of chancery jurisprudence cognizable under statutes which do not expressly provide that the Superior Court also shall have jurisdiction. It does not govern the present proceedings. Cases like *Baldwin* v. *Wilbraham*, 140 Mass. 459, and *Langmaid* v. *Reed*, 159 Mass. 409, which related to newly created special statutory subjects of equity not known to general chancery jurisprudence, are not relevant.

3. The policy by which the judgment debtor was insured contained this clause: "B. This policy does not cover loss from liability for, or any suit based on, injuries or death caused by any automobile (1) while driven or manipulated by any person under the age fixed by law or under the age of sixteen years in any event. . . ." The judgments here in question were recovered for injuries caused to the female plaintiff by being hit by an automobile of the insured. The finding of the judge in this respect is that, although before the accident which caused the injuries to the female plaintiff, hereafter called the plaintiff, a son of the principal defendant under sixteen years of age had been driving the automobile, yet just before the automobile struck the plaintiff, the father "suddenly leaned over to the left and took the wheel from his son, telling him to get out of the way." Apparently at this moment the automobile was thought by the father to be in a position of some danger either as being on the wrong side of the road or as likely to be driven off the road. The further finding is that "The son shrunk back in the seat, and the father thereafter guided the course of the automobile and entirely controlled its operation so far as possible so to do in the position in which he was, and the son thereafter did nothing except to blow the horn. The automobile crossed both street railway tracks, passed in front of the street car, and then, turning to the right, proceeded between the street car and the sidewalk and hit Rose Williams who was on the street for the purpose of taking the street car. The operation of the car was entirely controlled by the father while crossing both street

railway tracks, while passing in front of the street car and turning to the right on Massachusetts Avenue, and while proceeding on Massachusetts Avenue for a distance of at least the length of the street car, but Nelson was not in a position in the automobile at the time of the accident 'so that he could properly drive or manipulate the automobile,' and he was not in a position in which he could readily prevent the accident by applying the levers or pedals provided for stopping the automobile."

This finding of fact is amply supported by evidence, which need not be reviewed. It must be accepted as true. As matter of law it supports recovery under the policy. The dominating mind in control of the operation of the automobile and regulating its movement at the moment of impact with the plaintiff, was that of the father and not of the son. Although the distance travelled after the father took manual guidance of the automobile was comparatively short, perhaps not more than fifty or seventy-five feet, and the conditions of his driving were unfavorable to complete and skilful direction of its course, yet his initial choice was to drive on rather than to stop or pursue some other line of action. That the son blew the horn and had brought the machine into an improper position does not derogate from the paramount control of the father over it, nor prevent him from being, at the time of the injury to the plaintiff, the one by whom it was "driven or manipulated," within the meaning of those words in the policy.

The finding that the father's position was such that he could not readily prevent the accident by stopping the car is not decisive. That is not equivalent to a finding that it was impossible in reason for him to have stopped the car after he assumed control of its movements and before the plaintiff was injured. Moreover, the fundamental fact is that he was driving and that he elected to drive under the conditions which confronted him.

4. The language of the statute renders it applicable to every contract of insurance whereby one "is insured against loss or damage on account of the bodily injury or death by accident of any person." The words "loss or damage," in this connection in the light of their context, and the manifest purpose of the statute, include a case like the present where the insured has been held responsible to the extent of the rendition of a judgment against him, although no payment has been made on the judgment.

5. The husband of the female plaintiff recovered judgment against the insured for the loss or damages sustained by him because of the physical injury to his wife. The question is whether this judgment is for the "bodily injury . . . of any person." Bodily injury imports harm arising from corporeal contact. In this connection "bodily" refers to an organism of flesh and blood. It is not satisfied by anything short of physical, and is confined to that kind of injury. It does not include damage to the financial resources of the husband arising from a bodily injury to his wife. *Hey* v. *Prime*, 197 Mass. 474, and cases cited. *Keating* v. *Boston Elevated Railway*, 209 Mass. 278, 282. Personal injury in other connections has been held to be of more comprehensive significance. *Mulvey* v. *Boston*, 197 Mass. 178, 180. *Madden's Case*, 222 Mass. 487, 492. But "bodily injury . . . of any person" cannot reasonably be held to include the kind of loss suffered by the husband.

It follows from what has been said that in the suit by the wife the entry must be decree affirmed with costs, and in that by the husband the decree must be reversed, and in accordance with St. 1913, c. 716, § 2, a new decree entered dismissing his bill with costs.

So ordered.

LEWIS PARKHURST & others, executors, *vs.* TREASURER & RECEIVER GENERAL & another.

Middlesex. March 29, 1917. — September 13, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Charity. Tax, On legacies and successions. *World Peace Foundation.*

A corporation organized under the laws of this Commonwealth "for the purpose of educating the people of all nations to a full knowledge of the waste and destructiveness of war and of preparation for war, its evil effects on present social conditions and on the well-being of future generations, and to promote international justice and the brotherhood of man; and generally by every practical means to promote peace and good will among all mankind," whose incorporators gave time and services without other reward than the hope of benefit to mankind, and no pecuniary profit being even remotely available to any members of the corporation, and whose work consisted chiefly in the publication of literature and the employment of speakers to promote the purposes of the corporation, tending in the direction of educating the world in the true principles of international order

as a cure for the waste of preparation for war and the horrors of waging war, is a charitable society or institution within the meaning of St. 1912, c. 678, § 1, and St. 1909, c. 490, Part I, § 5, and accordingly the passing of property to it by will is not subject to a legacy and succession tax.

Whether the passing of a gift by will to a corporation is subject to a legacy and succession tax, or whether it is exempt from such a tax as the passing of a gift to a charitable society or institution, depends on the purposes and work of the corporation at the time of the death of the testator, when his will took effect after it was proved, and subsequent acts of the corporation only can be material so far as they tend to show what the character of the corporation was at that time.

PETITION, filed in the Probate Court for the County of Middlesex on March 3, 1917, under St. 1909, c. 490, Part IV, § 20, by the executors of the will of Edwin Ginn, late of Winchester, to recover $52,958.04, that being the amount, determined by the Tax Commissioner, of a legacy and succession tax paid by the petitioners to the Treasurer and Receiver General and alleged to have been imposed unlawfully on the passing by the will of the testator of a devise and legacy to the World Peace Foundation, a corporation organized under the laws of this Commonwealth and alleged to be a charitable institution exempt from taxation.

The Probate Court made a decree that the tax was assessed without authority of law and was exacted wrongfully, and ordered that the entire tax so assessed should be abated. The Treasurer and Receiver General appealed, and filed the following objections to the decree: "1. The provision in the will of Edwin Ginn for the benefit of the World Peace Foundation is not a devise or bequest to or for the use of a charitable, educational or religious society or institution, the proprety of which is by the laws of this Commonwealth exempt from taxation, or for or upon trust for any charitable purpose to be carried out within this Commonwealth, within the meaning of the legacy and succession tax law. 2. The tax described in the petition was duly assessed in accordance with the provisions of the legacy and succession tax law, and the decree ordering its abatement was accordingly contrary to law."

The appeal came on to be heard before *Loring*, J., who at the request of the parties reserved the case, upon the pleadings and the transcript of the testimony taken in the Probate Court, for determination by the full court.

W. H. Hitchcock, Assistant Attorney General, for the respondents.

F. W. Knowlton, for the petitioners.

RUGG, C. J. This is a petition to recover a tax levied by the tax commissioner upon a legacy given by Edwin Ginn for the benefit of the World Peace Foundation. By St. 1912, c. 678, § 1, amending St. 1909, c. 490, Part IV, § 1, property is not subject to this tax which passes by will "to or for the use of charitable, educational, or religious societies or institutions, the property of which is by the laws of this Commonwealth exempt from taxation." The statement of such exemptions, so far as here material, is in St. 1909, c. 490, Part I, § 5, as follows: "The following property . . . shall be exempted from taxation: — . . . Third, The personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated within this Commonwealth, the real estate owned and occupied by them or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase. Such real or personal property shall not be exempt if any of the income or profits of the business of such corporation is divided among the stockholders or members, or is used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes."

Mr. Ginn by his will provided for a large annual payment to the World Peace Foundation, a corporation organized under the laws of this Commonwealth. Its corporate purpose is declared in these words: "The corporation is constituted for the purpose of educating the people of all nations to a full knowledge of the waste and destructiveness of war and of preparation for war, its evil effects on present social conditions and on the well-being of future generations, and to promote international justice and the brotherhood of man; and generally by every practical means to promote peace and good will among all mankind."

The declaration of corporate purpose expresses one of the highest moral aspirations of the race. It adopts almost the very words of the angel song on the night of the Nativity. It reveals nothing on a close and technical analysis at all at variance with the lofty idealism of its general sentiments. In a large sense its object is to bring all mankind under fraternal, educational and humanitarian influences. The final establishment of universal peace among all the nations of the earth manifestly is an object of public charity.

The comprehensive definition in *Jackson* v. *Phillips*, 14 Allen, 539, at page 556, is this: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." It was said, also, in *Molly Varnum Chapter, D. A. R.* v. *Lowell*, 204 Mass. 487, at page 493: "Charitable institutions organized to administer trusts in aid of the general welfare, which are the outgrowth of the conditions of modern society," may be found to be valid charities. The avowed objects of this corporation come within these accepted definitions.

All the incorporators have devoted time, labor and service of great value to work of the corporation without material compensation, or other reward than the hope of benefit to mankind. There is no pecuniary profit even remotely available to any of the members of the corporation. *Massachusetts Society for the Prevention of Cruelty to Animals* v. *Boston*, 142 Mass. 24. There is an express decision in *Tappan* v. *Deblois*, 45 Maine, 122, to the effect that a bequest to promote peace is a charity. The World Peace Foundation in its statement of corporate purposes sets forth a strictly legal charity.

But it is contended that the nature of the work being conducted by the World Peace Foundation and its main actual activities stamp it as an organization striving for objects "opposed to the existing laws," and designed "to bring about changes in the laws or political institutions of the country," and that this cannot be held to be a charitable purpose within the rule formulated in the great case of *Jackson* v. *Phillips*, 14 Allen, 539, at page 555. The principle on which reliance is placed is settled. A bequest aimed at effecting a change in the existing laws and constitutions cannot be sustained as a charity. The "laws do not recognize the purpose of overthrowing or changing them, in whole or in part, as a charitable use." 14 Allen, at page 571. These words were used in applying that principle to a trust fund to be expended in aid of the passage of laws securing to women the right to vote and other political and business rights, and it was held that such a purpose

was not charitable but rather political. See also *Bowman* v. *Secular Society, Ltd.* [1917] 1 A. C. 406, 442.

The description of the work done by the corporation up to the beginning of the great war shows that it was all charitable in the accurate legal sense, and that it does not come within the inhibition of the principle just stated. It consisted chiefly in the publication of literature and the employment of speakers and writers of ability, widely respected for their character and attainments, to attempt to propagate an opinion among the peoples of earth in favor of the settlement of international disputes through some form of international tribunal and to cultivate a belief in the waste of warlike preparation, and in the practical wisdom of reductions in the armaments of nations, and in the education of children as well as of adults in the knowledge of peace and the superior advantages of peaceful solutions of international difficulties. It is not necessary to narrate in further detail the kind of work carried on by this corporation. The instrumentalities adopted in brief tended in the direction of educating the world in the true principles of international order as a cure for the waste of preparation for war and the horrors of waging war. The methods followed to attain this end were legitimate and were in harmony with the ideal which was the goal.

It cannot justly be said that the purpose was political, or the means other than educational. Efforts were not directed immediately to the change of existing laws, constitutions or governments. The general diffusion of intelligence upon the subjects taught well might result ultimately in a modification of governmental policies. A different kind of government would be demanded by a highly educated than by a densely ignorant body politic. A nation made up of individuals, each of whom believes and practises love of God and love of man, would be likely to pursue a diplomacy dissimilar to that of a nation whose subjects, as individuals, were actuated by selfishness, pride and greed. The Constitution of the Commonwealth declares that a constant adherence to the principles of piety and justice are essential to preserve the advantages of liberty and to maintain a free government and admonishes all legislatures and magistrates "to countenance and inculcate the principles of humanity and general benevolence." A conscientious following of these precepts by all people would re-

sult in the most enlightened government and wise and just laws perhaps differing in substantial part from those now prevailing, yet gifts to promote these ends would not come under the prohibition of the rule against gifts to change existing laws.

The aim of this corporation as manifested by the means it employed was to nourish a public sentiment and to develop a moral influence among all the people in favor of peace and against war. Ethical and religious sentiments, as well as social and economic motives, were or might properly be appealed to in order to attain this end.

The case at bar stands in this respect on the same footing as the charitable gift to secure the abolition of human slavery and to benefit fugitive slaves who might from time to time escape from the slaveholding States of the Union, both upheld as valid charities, in *Jackson* v. *Phillips*, 14 Allen, 539.

The vote passed in July, 1915, approving the general principles and policy adopted by the League to enforce Peace in Philadelphia in June, 1915, and instructing the directors and representatives of the foundation to support such principles and policy in its name, standing by itself does not justify the levy of the tax. It does not appear that this vote necessarily means or has been interpreted by the World Peace Foundation to mean that its resources are to be devoted to the exposition of that particular doctrine. It might be that a common end might be sought by different means. But, however that may be, it is not necessary to discuss the meaning of the vote nor the character of those principles and that policy. The vote was not passed until nearly a year and a half after the death of the testator and proof of his will. The time, as of which must be determined the question whether the World Peace Foundation is a charity, is when the testator died and his will took effect. *Pierce* v. *Stevens*, 205 Mass. 219, at page 222. That was early in 1914. Whether a tax is due depends upon its purposes declared and the work done by it before that time. As has been shown these were distinctly and strictly charitable.

Decree to be entered that the excise has been illegally exacted, with costs. St. 1909, c. 490, Part III, § 71.

So ordered.

UNION GLASS COMPANY *vs.* CITY OF SOMERVILLE.

Middlesex. June 18, 1917. — September 13, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Evidence, Competency, Of value, Admissions, Opinion: experts, Returns to Tax Commissioner. *Witness*, Impeachment of. *Corporation*, Returns to Tax Commissioner. *Practice, Civil*, New trial.

At the trial of a petition under St. 1906, c. 463, Part I, § 37, by a corporation for the assessment of damages to the petitioner's land and factories by changes of grade made in the abolition of the grade crossing of a railroad with a highway, where the president of the petitioner has testified as a witness, the presiding judge in his discretion may admit in evidence, as bearing upon the credibility of the witness, the annual reports made by the petitioner to the Secretary of the Commonwealth under St. 1903, c. 437, § 45, R. L. c. 110, § 51, and Pub. Sts. c. 106, § 54, and a letter to the local assessor, all signed by the witness as president, who in his testimony had placed the value of the corporate property materially in excess of the statements of such value in the reports and the letter, and also may admit in evidence for the same purpose returns to the Tax Commissioner for certain years made under Pub. Sts. c. 13, § 38, as amended by R. L. c. 14, § 37, which, although not signed by the witness, could be found by the jury to have been rendered with his knowledge and consent.

In the same case it was *held*, that the reports and returns, which were made before August 1, 1903, having been executed by the petitioner's officers, were competent evidence of value in behalf of the respondent.

It is within the discretionary power of a presiding judge to determine whether a witness offered as an expert is qualified sufficiently to give an opinion on the matter in question.

In the same case it was *held*, that, in admitting the returns in evidence, the presiding judge should have instructed the jury to disregard the items stating the market value of the shares of the petitioner, as these statements, required by statute to be made for the information of the Tax Commissioner, did not represent that the market or trading value of its capital stock corresponded with the value of its real estate that had been damaged by the changes of grade.

In the same case it was *said* that it was not necessary to decide whether under St. 1913, c. 716, § 1, the error mentioned above would have been sufficient to require a new trial, as a substantial error was committed in admitting other evidence.

In the same case it was *held* that the admission in evidence of returns, made by the corporation to the Tax Commissioner after August 1, 1903, when St. 1903, c. 437, § 48, took effect, which made such returns confidential and privileged and no longer admissible in evidence as admissions, was a material error seriously prejudicial to the petitioner, and required that the exceptions should be sustained. Following *Brackett* v. *Commonwealth*, 223 Mass. 119, 126.

PETITION, filed in the Superior Court on March 2, 1911, under St. 1906, c. 463, Part I, § 37, for the assessment by a jury of damages to the petitioner's land and glass factories on Webster Avenue and Prospect Street in Somerville by the changes of grade made in the abolition of a grade crossing of the tracks of the Fitchburg Railroad Company over Webster Avenue, near the station of the Fitchburg division of the Boston and Maine Railroad called Union Square.

The case was tried before *Fessenden*, J. The jury returned a verdict for the petitioner in the sum of $18,090; and the petitioner alleged exceptions relating to the admission of evidence, which are described in the opinion.

The case was submitted on briefs.

G. L. Mayberry & L. A. Mayberry, for the petitioner.

F. W. Kaan, for the respondent.

BRALEY, J. The petitioner's exceptions having been duly allowed, and no motion to dismiss the exceptions having been filed in this court by the respondent, the questions presented by the record are properly before us. *Doherty* v. *Phoenix Ins. Co.* 224 Mass. 310, 312.

The petitioner is a domestic corporation, and its lands having been entered upon for the purpose of raising the grade of certain public ways in connection with the abolition of a railroad crossing at grade, this petition was brought under St. 1906, c. 463, Part I, § 37. The only issue at the trial was the amount of damages. But, the discrepancy between the amount claimed and the amount awarded by the verdict being very substantial, the petitioner asks that a new trial be ordered because of erroneous rulings in the admission of evidence.

The annual reports made by the petitioner to the Secretary of the Commonwealth, as required by St. 1903, c. 437, § 45, R. L. c. 110, § 51, Pub. Sts. c. 106, § 54, and the letter to the local assessors, all of which were signed by its president, whose testimony placed the value materially in excess of the statements of value of the corporate property shown by the reports and letter, as well as the returns to the Tax Commissioner for the years 1892 to 1899, inclusive, and for 1901, 1902 and 1903, made under Pub. Sts. c. 13, § 38, as amended, and R. L. c. 14, § 37, which, although not signed by the witness, the jury could find were rendered with his

knowledge and consent, were on the record admissible in the discretion of the judge as bearing upon the credibility of the witness and upon the weight which should be given to his testimony. *Brigham* v. *Clark*, 100 Mass. 430. *Whipple* v. *Rich*, 180 Mass. 477. *Jennings* v. *Rooney*, 183 Mass. 577. *Peabody* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 489, 491, 492. *White Sewing Machine Co.* v. *Phenix Nerve Beverage Co.* 188 Mass. 407, 408.

It also is plain that, having been duly executed by the petitioner's officers, all the reports and returns above described were relevant evidence in behalf of the respondent. Pub. Sts. c. 13, § 38, and amendatory acts. R. L. c. 14, § 37. St. 1903, c. 437, § 45. *White Sewing Machine Co.* v. *Phenix Nerve Beverage Co. supra. Smith* v. *Paul Boyton Co.* 176 Mass. 217. *Pells* v. *Webquish*, 129 Mass. 469, 473.

Nor does error appear in the admission of the evidence of the respondent's expert. The judge was to determine whether the witness was sufficiently qualified to give an opinion, and his discretion is not shown to have been wrongly exercised. *Carroll* v. *Boston Elevated Railway*, 200 Mass. 527, 533.

It is contended further that, even if the returns were admissible, the jury should have been instructed to disregard the item showing the market value of the shares. This instruction should have been given. While required by statute to be stated for the information of the Commissioner who shall annually ascertain from the returns or in any other manner the market value of the shares of the capital stock of each domestic corporation to enable him to ascertain the fair cash value of all the shares constituting its capital stock for the purpose of assessing the franchise tax, the petitioner by this item did not represent that the market or trading value of its capital stock corresponded with the value of its real property for which damages were claimed. St. 1909, c. 490, Part III, § 41.

It is unnecessary to decide whether under St. 1913, c. 716, § 1, this error would have been sufficient to require a new trial, as the returns for the years 1904 to 1911 should have been excluded.

By St. 1903, c. 437, § 48, which took effect on August 1, 1903, they are made confidential or privileged, and can no longer be introduced as pointed out in *Brackett* v. *Commonwealth*, 223 Mass. 119, 126, decided since the trial of the case at bar. The admission

of this material evidence which was seriously prejudicial to the petitioner, requires that the exceptions should be sustained.

So ordered.

FREDERICK E. NICKELS *vs.* JOSEPH SCHOLL.

Suffolk. June 26, 1917. — September 13, 1917.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Statute, Construction. *Contract*, Of conditional sale. *Sale*, Conditional. *Mortgage*, Of personal property. *Notice*. *Equity Jurisdiction*, To restrain removal of personal property. *Municipal Corporations*, City or town clerk. *Real or Personal Property*.

St. 1912, c. 271, § 1, is as follows: "No conditional sale of heating apparatus, plumbing goods, ranges or other personal property which are afterwards wrought into or attached to real estate shall be valid as against any mortgagee, purchaser or grantee of such real estate, unless within ten days after the making of the contract of conditional sale, such contract, or a memorandum thereof signed by both parties thereto, is recorded in the clerk's office of the city or town in which the real estate is situated." *Held*, that, the clause ", or a memorandum thereof signed by both parties thereto," being enclosed in commas, the requirement of the signing by both parties does not apply to the contract of conditional sale itself when that is recorded but merely is intended to ensure the correctness of the memorandum, and the record of an original contract of conditional sale of heating apparatus signed by the purchaser and not by the seller, made within the required time in the clerk's office of the city in which the real estate is situated, is constructive notice of the contract, and gives the seller as against the mortgagee of the real estate the right to remove such heating apparatus, if unpaid for.

Under the statute quoted above, although R. L. c. 25, § 64, requires a city or town clerk to keep an index of instruments entered with him which are required to be recorded, the indexing of the record of such a contract of conditional sale is not a part of the record, and accordingly the recording within the required time by the city clerk of such a contract of conditional sale of plumbing materials installed in a house is none the less constructive notice of the instrument to a mortgagee of the house because the city clerk by mistake omitted to index the record of the contract in the name of the purchaser of the plumbing materials and inserted in the index only the name of their seller.

In a suit in equity involving the validity of the contracts of conditional sale for heating apparatus and plumbing materials mentioned above, it was found by a master to whom the case was referred that the heating apparatus and the plumbing materials were attached to the houses in the usual way, that they were of a stock pattern of a type easily duplicated in the open market and that they could be removed without causing any substantial injury to the buildings. *Held*, that a finding by the master that the heating apparatus and the plumbing materials were personal property was warranted.

BILL IN EQUITY, filed in the Superior Court on January 8, 1916, by the owner of certain land and the dwelling houses thereon on Hitchborn Street in Revere and also of two dwelling houses on Bow Street in Medford, all of which the plaintiff bought at public auction on December 20, 1915, from Mary A. Shine, as the mortgagee under certain power of sale mortgages given to her by one Louis Fleischer, to restrain the defendant from removing the heating apparatus and the plumbing appliances from such houses.

The case was referred to a master who filed a report containing the findings that are described in the opinion.

Later the case was heard by *Lawton*, J., upon the exceptions of both parties to the master's report. The judge overruled the plaintiff's exceptions to the master's report and also those of the defendant and ordered that a decree be entered dismissing the bill with costs. A final decree to that effect was entered; and the plaintiff and the defendant both appealed.

The case was submitted on briefs.

C. A. McDonough, for the plaintiff.

D. Stoneman, A. I. Stoneman & A. G. Gould, for the defendant.

CROSBY, J. The plaintiff, as owner of a certain dwelling house in Revere, seeks to restrain the removal therefrom, by the defendant, of the plumbing fixtures installed therein by one Karger under a contract with the former owner of the house. The plaintiff also, as the owner of two dwelling houses in Medford, seeks to restrain the defendant from removing therefrom certain steam heating apparatus which had been installed in the houses by one Connor under a contract with the former owner of the houses.

The master to whom the case was referred found that "The plaintiff became owner of the several lots and houses thereon at a foreclosure sale December 20, 1915. The mortgagee named in each mortgage was Mary A. Shine, the bookkeeper of the plaintiff, who held the mortgages for the benefit of the plaintiff. The defendant claims title to the plumbing materials under an assignment from one Karger dated July 6, 1915, and he claims title to the heating apparatus by virtue of an assignment from one E. Connor dated September 11, 1915."

The lots upon which the houses above referred to were erected formerly were owned by Louis Fleischer.

On December 31, 1914, Fleischer, for the purpose of erecting a

house on a lot of land owned by him at 69 Hitchborn Street in Revere, executed a construction mortgage to Mary A. Shine to secure the payment of a loan made by her to him. At the same time and as a part of the same transaction, Fleischer and Shine executed another instrument called a "construction agreement," which provided for the payment of the money as the work progressed on the house.

On February 2, 1915, Fleischer made a written agreement with one Karger whereby the latter agreed to furnish labor and materials and install the plumbing in two six family houses at 69 Hitchborn Street, Revere, and also in a three family house on the same street. Before the work was completed on the second six family house on lot No. 69, Karger refused to proceed further with the contract unless he was secured by Fleischer for the payment of the finished plumbing.

The master also found that "Fleischer offered the defendant as guarantor, and thereupon Fleischer and Karger on July 6, 1915, executed another written instrument in the form of a conditional bill of sale of the finished plumbing materials to be installed in the house in question. The conditional bill of sale provided that the plumbing materials were to remain the property of Karger until fully paid for. On the same day Karger assigned in writing this conditional bill of sale to the defendant to secure him on his guarantee to Karger, and Fleischer assented in writing to the assignment. The conditional bill of sale and the assignment were both recorded with the city clerk in Revere, July 6, 1915; but they were indexed in the records of the city of Revere under the name of Karger only, so that an examination of the index under the name of Fleischer would not disclose the record of either the contract or the assignment. Neither the plaintiff nor any one representing him had any actual notice of this conditional bill of sale and its assignment."

On January 20, 1915, Fleischer, then the owner of lots "A" and "B" on Bow Street, Medford, made two construction mortgages to Mary A. Shine to secure certain loans on each lot and the house to be erected thereon; and the same day, Fleischer and Shine made another written instrument which provided for the payment of the loans as the work progressed on the houses.

On March 26, 1915, Fleischer made a written agreement with

one Connor by which the latter agreed to furnish the heating apparatus for the houses on lots "A" and "B." This agreement was signed by Fleischer but was not signed by Connor. It was recorded in the city clerk's office in Medford on April 1, 1915. Payment by Fleischer under this agreement was also guaranteed by the defendant and, upon the failure of Fleischer to pay the balance due upon the contract that amount was paid by the defendant to Connor. And on the same date, the latter executed an assignment of the agreement to the defendant as security for such payment. The assignment from Connor to the defendant was not recorded.

The agreement between Fleischer and Connor was a conditional bill of sale and contained the following clause: "It is, however, expressly understood and agreed by and between the parties to this contract, that all stock and materials furnished by the heating contractor shall be and remain his property until payment is fully made therefor under the terms of this contract, and title thereto is expressly reserved by said contractor. It is also expressly understood and agreed by and between the parties hereto that all stock and materials furnished by the said contractor under this contract shall be considered personal property between the parties; and the said contractor expressly reserves the right to disconnect and remove from the premises all stock and materials so furnished, without notice, for non-performance or any breach of this contract, and the said contractor shall not be liable or guilty in any manner for trespass in so removing said property."

The master finds that "the plaintiff, or Mary A. Shine, or any one representing them, had no actual notice of this agreement between Connor and Fleischer or any notice either actual or constructive of its assignment to the defendant;" that "It is not contended that any express misrepresentations were made by Fleischer, Karger or the defendant to the plaintiff or to Mary A. Shine concerning the existence of the conditional sales and assignments;" and that the plumbing materials and heating apparatus were attached to the houses in the usual way, that they were of standard stock pattern of a type easily duplicated in the open market, and that they can be removed without causing any substantial injury to the buildings.

The plaintiff contends that, as the conditional contract of sale between Fleischer and Connor was not signed by Connor, it is

invalid under the provisions of St. 1912, c. 271; and that the defendant is not entitled to the heating apparatus installed by Connor.

Manifestly the instrument so recorded was the contract which under the statute was required to be recorded. The statute is as follows:

"Section 1. No conditional sale of heating apparatus, plumbing goods, ranges or other personal property which are afterward wrought into or attached to real estate shall be valid as against any mortgagee, purchaser or grantee of such real estate, unless within ten days after the making of the contract of conditional sale, such contract, or a memorandum thereof signed by both parties thereto, is recorded in the clerk's office of the city or town in which the real estate is situated."

In construing a statute and arriving at the intention of the Legislature, not only must the words used be considered, but the purpose to be accomplished is also to be regarded.

It is to be observed that there is a comma after "contract;" and the words "or a memorandum thereof signed by both parties thereto" are separated from the rest of the sentence by commas.

If a comma had not been placed after the word "contract" there would have been great force in the plaintiff's contention that the contract as well as the memorandum should be signed by both parties thereto in order to comply with the terms of the statute.

The punctuation plainly shows that it is only the memorandum that is to be signed by both parties. Although it has been held that punctuation may be disregarded, still it may be resorted to as an aid in construction when it tends to throw light on the meaning. *Maney* v. *Providence & Worcester Railroad*, 161 Mass. 283. *Commonwealth* v. *Kelley*, 177 Mass. 221.

Undoubtedly the intention of the Legislature in enacting the statute was to protect innocent persons from claims of ownership in personal property which had been attached to real estate under conditional sales.

If the contract itself is recorded it speaks for itself, and subsequent mortgagees, purchasers and grantees of the real estate are able fully to inform themselves as to its terms; while if only a memorandum of the contract is recorded and is made and signed by only one of the parties, his construction of the contract may be

incorrect, but if the memorandum is signed by both parties, they would be bound by their summary of the terms of the contract as embodied therein.

It seems plain that when the contract of conditional sale is recorded, the statute does not require it to be signed by both parties. Accordingly, the plaintiff's first exception to the master's report must be overruled.

In view of the master's finding with reference to the manner in which the plumbing materials and heating apparatus were attached to the buildings, and his further finding that they can be removed without substantial injury to the real estate, the plaintiff's second exception is overruled. The articles in question could have been found to be personal property. *Henry N. Clark Co.* v. *Skelton*, 208 Mass. 284. *Stone* v. *Livingston*, 222 Mass. 192.

The plaintiff contends that the error of the clerk of the city of Revere in failing to index properly the names of the parties to the conditional contract of sale of the plumbing materials, whereby the name of Fleischer did not appear in the index, rendered the record of no value, and that the record of the instrument erroneously indexed was not constructive notice to the parties.

While the statute, R. L. c. 25, § 64, requires a city or town clerk to make and keep an index of instruments entered with him which are required by law to be recorded, still the index ordinarily is no part of the record, and a mistake made in it by the clerk does not invalidate the notice afforded by a record otherwise in proper form.

The index is not designed for the protection of the parties recording the instrument but is for the convenience of those searching the records: it is for the purpose of furnishing additional facility in making such search. *Charham* v. *Bradford*, 50 Ga. 327. *Bishop* v. *Schneider*, 46 Mo. 472. *Green* v. *Garrington*, 16 Ohio St. 548. *Curtis* v. *Lyman*, 24 Vt. 338. *Dodge* v. *Potter*, 18 Barb. 193.

Although the conditional bill of sale of the plumbing materials given by Fleischer to Karger was not indexed under the name of Fleischer, that mistake cannot affect the rights of the defendant for the reasons above stated. Accordingly the plaintiff's third exception is overruled.

The plaintiff is charged with constructive notice of the defendant's claim and holds the real estate subject thereto. As the plain-

tiff's exceptions to the master's report cannot be sustained, it becomes unnecessary to consider the defendant's exceptions.

The final decree dismissing the bill must be affirmed with the costs of the appeal.

So ordered.

WILLIAM C. O'BRIEN'S CASE.

Suffolk. June 26, 1917. — September 13, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Workmen's Compensation Act.

Under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 11 (*b*) as amended by St. 1914, c. 708, § 6, for additional compensation for the specific injury consisting of "the reduction to one tenth of normal vision in either eye with glasses," in a claim for such additional compensation for an injury to the employee's right eye it appeared that the vision of the employee's left eye was normal and that the vision of the injured eye without a glass was about one sixtieth, while the vision of the injured eye alone with a glass was nearly normal, but that the use of glasses for both eyes together was impracticable, because no glass that could be devised for the injured eye which would give a fused vision with the good eye, and that with any glasses the use of both eyes resulted in a sort of double vision which prevented any useful sight. The Industrial Accident Board decided that "the employee has sustained a reduction of vision in the injured eye to one tenth of normal with glasses." *Held*, that the board interpreted correctly the intention of the Legislature in considering the vision of one eye as compared with the normal vision of both eyes together and that their decision was warranted.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding to William C. O'Brien, who was employed as a mason by the firm of Harmon and Hopkins at Taunton, specific compensation (in addition to the compensation theretofore paid to him) of $10 a week for a period of fifty weeks from April 11, 1916, the date of his injury, for reduction of vision in his right eye to one tenth of normal with glasses under the provision of St. 1911, c. 751, Part II, § 11 (*b*), as amended by St. 1914, c. 708, § 6.

The case was heard by *Fox*, J. The evidence reported by the

arbitration committee is described in the opinion. No new evidence was presented before the Industrial Accident Board and the rulings and findings of the arbitration committee were affirmed and adopted. The board found that the employee had sustained a reduction of vision in the injured right eye to one tenth of normal with glasses as a result of a personal injury which arose out of and in the course of his employment; and that there was due the employee a weekly compensation of $10 for a period of fifty weeks, less an overpayment by the insurer of $8.57, the net sum due the employee being $491.43.

The judge made a decree in accordance with the decision of the Industrial Accident Board ordering the insurer to pay to the employee the sum named above. The insurer appealed.

The case was submitted on briefs.

N. F. Hesseltine, J. W. Bond & J. F. Scannell, for the insurer.

J. B. Tracy, for the employee.

DE COURCY, J. A piece of steel entered the employee's right eye on April 11, 1916; and it is conceded that the resultant injury arose out of and in the course of his employment. Under the workmen's compensation act additional compensation is payable for certain specified injuries, among others, for "the reduction to one tenth of normal vision in either eye with glasses." St. 1911, c. 751, Part II, § 11 (*b*), as amended by St. 1912, c. 571, § 2; St. 1914, c. 708, § 6.

The evidence on which the Industrial Accident Board found that the employee was entitled to the benefit of this provision was substantially undisputed. The vision of the employee's left eye is normal. That of the right eye, without a glass, is about one sixtieth. By covering the good eye, the vision of the injured eye alone, with a glass, is nearly normal. This however cannot be utilized when he uses the normal eye and the corrected eye together, as there is a lack of co-ordination or correlation, a sort of double vision. No glass that he could get for the injured eye would give him fused vision with the good eye. The result is that when both eyes are used together glasses are impracticable.

The decision of the Industrial Accident Board was that "the employee has sustained a reduction of vision in the injured eye to one tenth of normal with glasses." They reached this conclusion by taking into consideration the vision of the right eye as

compared with the normal vision of both eyes used together. In doing so, we think the board correctly interpreted the intention of the Legislature. The construction contended for by the insurer would lead to the unreasonable result of allowing compensation for the loss of an eye, but none for an injury that rendered the eye worse than useless. On the testimony of the insurer's own expert the employee would enjoy normal vision with the left eye if the injured eye were removed entirely.

Decree affirmed.

THOMAS LEVANGIE'S CASE.

Suffolk. June 25, 1917. — September 19, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Workmen's Compensation Act. Jurisdiction. Waiver.

The Industrial Accident Board is not a court of general or limited common law jurisdiction. It is purely and solely an administrative tribunal, specifically created to administer the workmen's compensation act with the assistance of the Superior Court, and as such a tribunal the board possesses only such authority and power as have been conferred upon it by express grant or arise from such a grant as necessary and incident to the granted powers.

From the nature of the Industrial Accident Board as a special administrative tribunal created for the administration of the workmen's compensation act it follows that a full performance of the conditions of the act is prerequisite to its jurisdiction and that the extent and limits of its statutory authority cannot be enlarged, diminished or destroyed by express consent or by waiver.

Under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part III, § 5, as amended by St. 1912, c. 571, § 10, and St. 1914, c. 708, § 9, that, "If the association and the injured employee fail to reach an agreement in regard to compensation under this act, or if they have reached such an agreement, which has been signed and filed in accordance with the provisions of this act, and compensation has been paid or is due in accordance therewith and the parties thereto then disagree as to the continuance of any weekly payments under such agreement, either party may notify the Industrial Accident Board who shall thereupon call for the formation of a committee of arbitration," the Industrial Accident Board has no jurisdiction to call an arbitration committee, where an agreement for compensation filed with and approved by the Industrial Accident Board has been performed fully by the insurer and there never has been any disagreement as to the continuance of any weekly payment under the agreement, where the failure of the employee to file a claim for additional compensation with the Industrial Accident Board within the time required by

St. 1911, c. 751, Part II, § 15, was not due to physical or mental incapacity or the result of ignorance of the right to additional compensation under St. 1911, c. 751, Part II, § 11, as amended, and where there was no mistake of fact as to the time of the injury or as to its nature, degree or probable permanency or other "reasonable cause" within the meaning of St. 1911, c. 751, Part II, § 23, added by St. 1912, c. 571, § 5, for the failure to make a claim within the period prescribed by § 15, and no claim was filed with the board within a reasonable time after the employee first learned definitely of the permanency of the specific injury on which his claim for additional compensation was based.

In the same case it appeared that, at the time the agreement for compensation was approved by the Industrial Accident Board, an examination of the records of the hospital and of the report of a physician would have disclosed to the board the fact that the legs of the employee were then and always would be permanently incapable of use, and it was *said* that the approval of the agreement by the board without an examination and consideration of this evidence did not afford a proper ground for reopening the agreement.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding to Thomas Levangie, the employee, under the circumstances stated in the opinion additional compensation for a period of one hundred weeks on the ground that both legs were permanently incapable of use by reason of his injury.

The case was heard by *Fox*, J. The proceedings and the essential facts are described in the opinion. The judge made a decree that the insurer should pay to the insured the sum of $1,000 for specific compensation. The insurer appealed.

The case was submitted on briefs.

N. F. Hesseltine & J. F. Scannell, for the insurer.

G. Gleason, for the employee.

PIERCE, J. On May 19, 1913, the employee, a carpenter in the employment of Simpson Brothers Corporation, a subscriber, slipped and fell backward from a staging a distance of about fourteen feet, thereby receiving a physical injury which the insurer admits arose out of and in the course of the employment.

The facts present a typical history of a fractured spine caused by an accident. Ever since the accident the legs of the employee have been paralyzed from above the hips down and have been absolutely without sensation or power. From the time of the injury the employee has been practically bedridden and is and has been absolutely incapacitated for any work which requires moving legs. "Aside from the complete paralysis of his legs (and sphincters)

he is apparently in excellent health." At the hearing before the committee in answer to the question "You knew your back was broken?" the employee testified "I know now. I knew my back was fractured, but people time and again come to my bed and told me that people were the way I was and come through all right, so I lived in that hope." He further testified: "I never expected to use them as before I injured them," "I always had hopes that they would come around all right," and thought as late as June 16, 1916, "I would get on crutches, and finally get better so I could walk around a little bit." To the question "That was your hope?" he answered, "Yes."

Shortly after the accident the insurer and the employee reached an agreement in regard to compensation for the period of total disability to begin June 2, 1913. This agreement was filed with the Industrial Accident Board and was approved by it upon June 30, 1913. St. 1911, c. 751, Part III, § 4, as amended by St. 1912, c. 571, § 9. Subsequently a decree in the Superior Court was entered thereon. St. 1911, c. 571, Part III, § 11, as amended by St. 1912, c. 571, § 14. Since June 30, 1913, payments have been made uninterruptedly to the employee in performance of the terms of the agreement of compensation.

On June 16, 1916, the Industrial Accident Board refused to approve an agreement to accept a lump sum payment of $1,100 in addition to $1,490 then already received, in redemption of the liability of the insurer for all subsequent weekly payments, because not satisfied that the proposed settlement was for the best interest of the employee or his dependents. St. 1911, c. 751, Part II, § 22, as amended by St. 1914, c. 708, § 8. Upon the solicitation of a former member of the Industrial Accident Board to be permitted "to handle" on a percentage basis the claim of the employee, the employee signed a contract to that end and thereafter on September 13, 1916, filed with the Industrial Accident Board a "Notice of Failure of Parties to Reach an Agreement," the cause of the disagreement being given as the "refusal of insurer to pay specific compensation for the loss of the use of both legs." St. 1911, c. 751, Part III, § 5, as amended by St. 1912, c. 571, § 10; St. 1914, c. 708, § 9. At the request of the employee the Industrial Accident Board called an arbitration committee which met on Saturday, October 7, 1916, and again by adjournment on October 21, 1916,

and proceeded to take testimony notwithstanding the objection of the insurer that the committee was without jurisdiction in the case.

No claim for compensation was filed by the employee with the Industrial Accident Board previous to the hearing before the arbitration committee. A claim for compensation, defective and inadequate because of its failure to set out the cause of the fall from which the injury resulted, was filed with the Industrial Accident Board October 30, 1916.

The act in Part II, § 15, provides that: "No proceedings for compensation for an injury . . . shall be maintained . . . unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, . . . in the event of his physical or mental incapacity, within six months after . . . the removal of such physical or mental incapacity." The formal and essential requisites of such a claim as set out in Part II, § 23, amended by St. 1912, c. 571, § 5, are, that "The claim for compensation shall be in writing and shall state the time, place, cause and nature of the injury; it shall be signed by the person injured or by a person in his behalf, or, in the event of his death, by his legal representative or by a person in his behalf, or by a person to whom payments may be due under this act or by a person in his behalf, and shall be filed with the Industrial Accident Board. The failure to make a claim within the period prescribed by section fifteen shall not be a bar to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause."

In support of the authority of the Industrial Accident Board to call the arbitration committee before the filing of any claim for compensation with the board, the employee contends that the inhibition of the act that "No proceedings for compensation for an injury . . . shall be maintained . . . unless" a written claim shall have been made within the time provided by the act, has been "waived by the agreement of the insurer to pay compensation, the approval of such agreement by the Industrial Accident Board, and the decree of the Superior Court based on this agreement." The answer to this position is that the Industrial Accident Board is not a court of general or limited common law jurisdiction; that it is purely and solely an administrative tribunal, specifically cre-

ated to administer the workmen's compensation act in aid and with the assistance of the Superior Court, St. 1911, c. 751, Part III, § 3, as amended by St. 1912, c. 571, § 8; St. 1915, cc. 123, 275; St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14; *Opinion of the Justices*, 209 Mass. 606; *McNicol's Case*, 215 Mass. 497; *Brown's Case, ante*, 31, and as such possesses only such authority and powers as have been conferred upon it by express grant or arise therefrom by implication as necessary and incidental to the full exercise of the granted powers. *Mackin* v. *Detroit-Timkin Axle Co.* 187 Mich. 8. *Borgnis* v. *Falk Co.* 147 Wis. 327, 359.

It follows that full performance of the conditions of the act are essential prerequisites to the jurisdiction of the board, and that its authority and the statutory limitation upon the exercise of it cannot be enlarged, diminished or destroyed by express consent or waived by acts of estoppel. *Webster* v. *Commonwealth*, 5 Cush. 386, 404. *Elder* v. *Dwight Manuf. Co.* 4 Gray, 201, 204. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87. *Bearce* v. *Bowker*, 115 Mass. 129, 130. *Santom* v. *Ballard*, 133 Mass. 464. See *Fierro's Case*, 223 Mass. 378; *Bushnell* v. *Industrial Board of Illinois*, 276 Ill. 262.

It is further contended that the Industrial Accident Board acquired jurisdiction under St. 1911, c. 751, Part III, § 5, as amended by St. 1912, c. 571, § 10, St. 1914, c. 708, § 9, which provides: "If the association and the injured employee fail to reach an agreement in regard to compensation under this act, or if they have reached such an agreement, which has been signed and filed in accordance with the provisions of this act, and compensation has been paid or is due in accordance therewith and the parties thereto then disagree as to the continuance of any weekly payments under such agreement, either party may notify the Industrial Accident Board who shall thereupon call for the formation of a committee of arbitration." We are of opinion that the quoted provision did not confer jurisdiction upon the Industrial Accident Board to call an arbitration committee before the filing of a claim for compensation, St. 1911, c. 751, Part II, § 15, because upon the facts the agreement as approved by the Industrial Accident Board has been fully performed by the insurer, there has never been any disagreement as to the continuance of any weekly payment under

the agreement, the failure of the employee to file a claim for compensation with the Industrial Accident Board before October 30, 1916, was not due to physical or mental incapacity, or the result of ignorance of the right to additional compensation under St. 1911, c. 751, Part II, § 11, and acts in amendment thereof, nor was there a mistake of fact as to the time of the injury or as to its nature, degree or probable permanency or other "reasonable cause" within the meaning of St. 1911, c. 751, Part II, § 23, as amended by St. 1912, c. 571, § 5, for the failure to make a claim within the period prescribed by § 15. *McLean's Case*, 223 Mass. 342. *Gorski's Case*, 227 Mass. 456. Moreover, the claim filed with the Industrial Accident Board on October 30, 1916, was not presented to that board within a reasonable time after October 2, 1916, the day when the employee first learned definitely that his legs were rendered permanently incapable of use. *Carroll's Case*, 225 Mass. 203.

An examination of the records of the hospital and the report of Dr. Baldwin would have disclosed to the Industrial Accident Board that the legs of the employee were then and always would be permanently incapable of use, but its approval of the agreement without an examination and consideration of this evidence does not afford a proper ground for reopening the agreement.

As the hearing before the committee was called improperly it becomes unnecessary to consider the objections taken to the admission of testimony at the hearing or the requests for rulings. *Buck* v. *Dowley*, 16 Gray, 555.

The decree should be reversed and a decree entered to the effect that there is no claim against the insurer.

So ordered.

WALTER C. COGSWELL, trustee, *vs.* HENRY E. WESTON & others.

Essex. November 10, 1916. — September 20, 1917.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Capital and Income. Trust, Apportionment of expenses caused by misappropriation.

Where the two trustees holding a trust fund created by will were also the beneficiaries for life of the trust, being entitled to the income of the trust in equal shares, and where one of these trustees wilfully misappropriated a large amount of the trust property and in consequence was removed, and his co-trustee, who was shown to have been culpably negligent in permitting the misappropriation to occur, died, and thereafter a new trustee was appointed, to whom a surety company, which was the surety on the bond of the defaulting trustee, paid the amount of the defalcation, the new trustee was instructed that he should pay the general expenses of the investigation of the trust estate and of the doings of the former trustees, which had resulted in the exposure of the extensive misappropriations, and also should pay the expenses incident to the recovery of certain real estate in another State from an attempted fraudulent sequestration of it by the dishonest trustee, out of income in his hands which under the terms of the trust would go to the former trustees as beneficiaries, instead of paying these expenses from the capital of the trust which belonged to blameless remaindermen, because the expenses were caused by the misconduct of one beneficiary and the culpable carelessness of the other.

In the case stated above it was *pointed out*, that the fact that one of the former trustees and beneficiaries had died was immaterial, as those who claimed under the beneficiaries stood in their shoes.

In the same case it also was *pointed out* that the fact, that the full amount misappropriated from the capital of the trust fund had been restored by the surety upon the probate bond of the defaulting trustee, did not change the equities of the case, because, after the amount taken had been paid back, the trust fund still would be depleted by the amount of the expenses named above.

Upon the same bill for instructions, in answer to another question, it was *held*, that the expenses incidental to the prosecution of the action on the probate bond against the defaulting trustee and his surety could not be charged to income, because of the theory of the law that the taxable costs prescribed by the Legislature and recoverable in such an action on the bond were a full indemnity for these expenses. Following *McIntire* v. *Mower*, 204 Mass. 233.

In the same case it also was *held*, that, if the new trustee, before the payment made by the surety, had found the trust fund so depleted that he was obliged at the start to use some of the capital to meet the general expenses caused by the faithlessness of the trustees, the capital should be made whole by restoring to it this amount out of the income payable to the beneficiaries whose active or culpable fault as trustees had caused the expenses.

BILL IN EQUITY, filed in the Probate Court for the county of Essex on January 28, 1916, by the present trustee under the will of Nathan Weston, late of Salem, for instructions.

The questions on which the plaintiff sought instructions were as follows:

"1. Should the charges and expenses attending the investigation of the trust estate and of the acts and doings of the former trustees in relation thereto be charged in the account of the plaintiff against the principal or income of the trust?

"2. Should the charges and expenses attending the recovery of the Chicago real estate be charged in the account of the plaintiff against the principal or income of the trust?

"3. Should the charges and expenses attending the suit against said Henry E. Weston and the American Surety Company of New York upon the bond of said Henry E. Weston as trustee be charged against and borne by the principal of the fund to the exoneration of the income or charged against the income so as to preserve the principal intact?

"4. (As amended.) If the income is to be exonerated from the payment of charges and expenses, is the American Surety Company of New York entitled to be subrogated to the rights of Henry E. Weston to the income accrued or that may accrue upon one half of the principal amounting to about twenty-two thousand dollars which was not misappropriated, and is said Surety Company subrogated to the rights of William H. Weston to receive any income accrued before May 1, 1905, or is the defendant Pratt entitled by reason of his assignments to the income that may accrue thereon?

"5. If the charges and expenses are to be borne by the income accruing since May 1, 1905, should the trustee restore to the principal from the income, any portion of the principal heretofore expended for such purposes?"

The Probate Court made a decree answering, to the first question, that "The expenses of investigating the condition of the trust estate and the acts of the former trustee in relation thereto should be charged to principal;" to the second question, that "The charges and expenses attending the recovery of the Chicago real estate should be charged to the principal;" to the third question, that "The amount recovered on execution from the American Surety Com-

pany having included principal and interest thereon from the day of judgment, the charges and expenses attending the suit in which said amount was recovered, less the costs taxed in said suit, should be paid from the amount so recovered. The balance of said amount should then be apportioned between principal and income in such manner that the principal shall be such amount as invested at six per cent interest on May 1, 1905, would produce said balance on July 7, 1913, the date of said execution. The principal so found should be held by the trustee and the remainder of the fund paid to the persons entitled to receive the income of the trust fund;" to the fourth question, that "The American Surety Company is entitled to be subrogated to the right of Henry E. Weston to the income of his share of the estate, except as to the income of one half of $123,825.99 restored by it to the principal, and said company is subrogated to the rights of William H. Weston to receive the income of his share of the estate to May 21, 1905," and, as to the fifth question, answered that it had become "immaterial and need not be further considered."

The American Surety Company of New York and Charles R. Darling, guardian *ad litem*, appealed from the decree.

The case came on to be heard by *De Courcy*, J., who reserved it, upon the pleadings and a statement of facts as agreed by the parties, for determination by the full court.

W. C. Cogswell, trustee, stated the case.

H. Wheeler, for the American Surety Company of New York.

C. R. Darling, guardian *ad litem* for persons not ascertained or not in being, *pro se*.

A. C. Vinton, administrator with the will annexed of the estate of William H. Weston, *pro se*, submitted a brief.

J. H. Stone, for Marland L. Pratt, submitted a brief.

RUGG, C. J. This is a bill by the trustee under a will for instructions as to the apportionment between capital and income of certain expenses incurred in the administration of his trust. Henry E. Weston, who formerly administered this trust, was removed and judgment was recovered on May 1, 1905, against him and the American Surety Company of New York as his surety, for the penal sum of his bond as such trustee. Execution thereon issued for the amount found to be the deficit in the principal of the trust fund for which Henry E. Weston was liable by

reason of his misappropriations, with interest thereon from the date of judgment, and costs. The pertinent facts and the grounds of decision in that case are reported in *Harmon* v. *Weston*, 215 Mass. 242. The amount of the execution has been paid to the present trustee by the American Surety Company. That company has proved the amount so paid as a debt against the insolvent estate of William H. Weston, who died in May, 1905, and who had been a co-trustee of the estate with Henry E. Weston. The facts and grounds for that proof are set forth in *American Surety Co. of New York* v. *Vinton*, 224 Mass. 337.

The expenses which are the subject of the present bill may be grouped under three heads: 1. General expenses of investigation of the trust estate and of the doings of former trustees resulting in the disclosure of extensive misappropriations by Henry E. Weston. 2. Expenses incident to the recovery of real estate in Chicago arising from an attempted sequestration respecting which it appears from the facts in the report that Henry E. Weston was actively fraudulent. 3. Expenses in connection with litigation against Henry E. Weston and the American Surety Company on the probate bond.

We consider the first two classes of expenses together. The regular annual or periodically recurring expenses arising in the administration of a productive trust commonly are paid out of the income, while extraordinary and unusual expenses are chargeable against the capital. The costs of litigation generally fall in the latter class. These rules apply in cases where the question concerns life tenants and remaindermen, both guiltless of any wrong against the trust and where the point of incidence of proper expenses must be determined as between innocent persons. But these rules are not necessarily applicable to cases where the question arises between a life tenant, whose wrongful conduct amounting to an active and intentional breach of trust directly has caused the expense, and a remainderman whose conduct is free from blame. In the case at bar, under the will Henry E. Weston is entitled for life to the income of one half of the remainder of the estate, or to the whole of the remainder after the other half has been paid to the administrator of the estate of William H. Weston, as is required by the decision reported in *Harmon* v. *Weston*, 215 Mass. 242, 248. Henry E. Weston misapplied and misappropriated funds

of the estate and these expenses have followed as the natural result of his intentional wrongdoing. While William H. Weston was not guilty of any misappropriation in his administration of the trust estate, it is manifest from the facts stated in the report that it was through his negligence and culpable inattention that Henry E. Weston was enabled to misapply so much of the estate. The net income of the estate in the hands of the plaintiff must go under the will to these former trustees as beneficiaries, whose active and culpable neglect of duty and intentional misfeasance in their trust have caused these expenses, or to those claiming by or under them. The latter stand in no better posture than the beneficiaries in this aspect of the case. As is pointed out in *Harmon* v. *Weston*, 215 Mass. 242, the ultimate beneficiaries of the principal of half of the trust fund, of which Henry L. Weston is entitled to the income during his life, cannot now be determined. They may be persons in no sense answerable directly or indirectly for his conduct as trustee.

All rules for the apportionment of expenses between life tenant and remainderman have been worked out in order to accomplish in general equitable results. They ought not to be followed when they lead to manifestly contrary results. It seems inequitable to cast upon innocent third persons an expense which can be borne by those whose reprehensible conduct has caused it. The immediate occasion of all expenses of the trust in the case at bar has been culpable want of fidelity in the administration of the trust by the beneficiaries for life. So far as Henry E. Weston is concerned, it must be taken on this record that these expenses have resulted in considerable degree, if not entirely, not from unsound judgment or misplaced confidence, but from a more blameworthy intentional misappropriation of the funds of the trust. Under these circumstances, equitable distribution of the financial burdens which are the subject of the first and second inquiries seems to require that they rest upon the income.

It is urged that, since by the payment of the execution issued in consequence of the decision in *Harmon* v. *Weston*, 215 Mass. 242, the capital of the trust has been restored fully by the surety upon the probate bond of Henry E. Weston, there are no equities in favor of the remaindermen entitled to consideration. It is true that thus the amount actually misappropriated by the trustee

has been returned to the trust. But this by no means makes the trust whole and intact for his wrongdoing. The estate still is depleted to the extent of the amounts here in controversy as the direct result of faithlessness in administering the trust. It has been necessary to incur them all by reason of maladministration by the life beneficiaries acting as trustees. If it had not been for such maladministration, there would have been no such expenses. It is inequitable that beneficiaries or their representatives or assignees should hold the annual income free from charge in this respect at the expense of the capital of the trust.

The third class of expenses relates to the prosecution of the action on the probate bond in *Harmon* v. *Weston*. These cannot be charged against income. It was held in *McIntire* v. *Mower*, 204 Mass. 233, that such expenses, because of the terms of the statute law, constituted no liability on the part of the defaulting trustee. That decision is decisive against their charge against the income payable to the defaulting trustee in the case at bar. That expense falls within the general rule. That general rule was stated in *Parsons* v. *Winslow*, 16 Mass. 361, and need not be repeated. It rightly was followed by the Probate Court in framing its decree.

Cases like the present do not often arise. But see in this connection, *In re Ungrich*, 201 N. Y. 415; *Cattley* v. *West*, [1904] 2 Ch. 785; *Raby* v. *Ridehalgh*, 7 DeG., M. & G. 104; *Blake* v. *Pegram*, 109 Mass. 541; and *Belknap* v. *Belknap*, 5 Allen, 468.

In view of what has been said, it is unnecessary to consider the fourth request as amended, because that is based upon the supposition that the income is exonerated. Any discussion of the relative rights of Pratt as the assignee of the life tenants, and the American Surety Company as the surety which has paid its obligation, becomes irrelevant, because, whatever may be their rights as to each other, they both must yield to the controlling principle which has been stated. But it is not intended hereby to narrow or qualify in any respect what was decided in *Harmon* v. *Weston*, 215 Mass. 242, and in *American Surety Co. of New York* v. *Vinton*, 224 Mass. 337. Both those cases stand in full force and are in harmony with the conclusions here reached.

There is no difference in the governing principle, even if the plaintiff found the trust estate so depleted that he was obliged at the start to use some of its capital in meeting these expenses. The

capital should be made whole out of the income payable to those as beneficiaries whose active and culpable fault as trustee or trustees has caused the expense, according to the principles here stated. The fifth question should be answered accordingly.

The fourth question need not be answered. The decree of the Probate Court as to the third question was right. The answers to the first and second questions are that the expenses there referred to should be paid from the income. Decree is to be entered in conformity to these conclusions.

So ordered.

FREDERICK K. DAY *vs.* OLD COLONY TRUST COMPANY.

Suffolk. March 7, 1917. — September 24, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Conservator. Contract, Implied in law. *Practice, Civil,* Admission of truth of facts set forth in a pleading. *Pleading, Civil,* Answer. *Estoppel. Bank.*

Description by CARROLL, J., of the relation of a conservator appointed under R. L. c. 145, §§ 40, 41, as amended by St. 1910, c. 95, to the property of his ward.

If a conservator makes a deposit in a bank in his own name as conservator for his ward, the bank is accountable to him and not to his ward for the amount of the deposit.

A conservator, after the death of his ward, has a right to retain the possession or custody of the property of the ward in his hands until his account has been passed upon by the Probate Court, and, until the amounts due to him for services and expenses have been determined by that court, he may hold possession of the property against the executor of the will of his deceased ward.

Under a statement, in a report of a case by the presiding judge, that "At the trial the allegations and facts set forth in the answer of the defendant were admitted to be true," the plaintiff is not bound by a mere conclusion of law alleged in the answer.

In an action of contract, where the plaintiff has admitted at the trial that "the allegations and facts set forth in the answer of the defendant" are true, and the answer contains a statement which may be either a conclusion of law or a statement of fact and which, if it is a statement of fact, is of doubtful meaning and the decision of the case depends upon its meaning, the presiding judge should not order a verdict for the defendant, but should leave to the jury the question of fact that is doubtful upon the statement in the answer, if, as in the present case, there is evidence for the plaintiff upon that issue.

In an action for money had and received brought by a conservator against

trust company, with which, as alleged, he had deposited the money in his own name as conservator for his ward, it appeared that the ward of the plaintiff had died and that the defendant had paid the amount of the deposit to the executor of her will without the knowledge or consent of the plaintiff. The judge allowed the defendant to introduce in evidence, subject to the plaintiff's exception, a petition of the executor for a partial distribution of the estate of the plaintiff's ward, in which the plaintiff had joined and in which the estate was represented as including the amount of the deposit with the defendant. The defendant contended that the plaintiff was estopped by this proceeding, to which he was a party, from claiming the fund deposited by him as conservator, but no such defence of estoppel was set up in the answer. It was *held* that the defence of such an estoppel, not being set up in the answer, was not open to the defendant, but it was *said*, that, if the defence had been open under the pleadings, it could not prevail, because the plaintiff by joining in the former proceeding had not lost his right to claim the deposit if it stood in his own name and the contract of the defendant was made with him and not with his deceased ward.

CONTRACT to recover $18,254.84 alleged to have been had and received by the defendant to the plaintiff's use, being the amount of a deposit alleged to have been held by the defendant for and subject to the order of the plaintiff and to have been paid by the defendant without the consent of the plaintiff to the executor of the will of Anna W. Meeker. Writ dated June 3, 1915.

The second paragraph of the defendant's answer was as follows:

"2. And further answering the defendant says that on April 23, 1906, Mary E. Allen, attorney for Anna W. Meeker, a resident of Newton in the county of Middlesex in the said Commonwealth, opened a checking account so called in the banking department of the defendant trust company; that on the ninth day of October, 1906, Frederick K. Day, the plaintiff in this action, duly filed with the defendant his appointment as conservator of the estate of said Anna W. Meeker under a decree of the Probate Court for the county of Middlesex, dated September twenty-seventh, 1906; that subsequently deposits were made by the plaintiff as conservator, as aforesaid, to the credit of said account of Anna W. Meeker; that the defendant thereafter held said property and all subsequent deposits made to the credit of said account as the property of said Meeker, but subject to the control of the plaintiff and the court during the lifetime of said Meeker, provided said Day should so long be conservator of said estate; that said Anna W. Meeker died on the thirtieth day of June, 1913; that said Anna W. Meeker

left a last will and by a decree of the Probate Court of the county of Middlesex dated September ninth, 1913, said will was duly proved and allowed and John L. Nichols of Boston in the county of Suffolk, in this Commonwealth, the executor therein named, was appointed and duly qualified as executor thereof, which decree is now in full force and effect; that on the twentieth day of October, 1913, the amount of money held by the defendant as the property of said Meeker amounted to $18,254.84; that on said day said John L. Nichols, the duly qualified executor of the last will of the said Anna W. Meeker, presented and filed with the defendant duly authenticated copies of his appointment as executor of the last will of said Anna W. Meeker and subsequently it paid to said Nichols as executor as aforesaid the entire amount due from it to the estate of said Anna W. Meeker."

In the Superior Court the case was tried before *Brown*, J. The report of the judge stated that "At the trial the allegations and facts set forth in the answer of the defendant were admitted to be true."

The plaintiff further introduced evidence that the money in question stood on the books of the trust company "Frederick K. Day, Conservator for Anna W. Meeker," that the payment of the money by the trust company to the executor of the will of Anna W. Meeker was made without the knowledge or consent of the plaintiff, and that after such payment the trust company notified the plaintiff that the account in question had been closed.

The defendant introduced in evidence a petition for partial distribution and the final decree thereon in the Probate Court of the county of Middlesex in the settlement of the estate of Anna W. Meeker, to which petition the plaintiff was a party. This petition alleged that the petitioner had in his hands as executor more than $18,000 in cash. The petition and decree were admitted in evidence subject to the objection and exception of the plaintiff.

This was all the evidence in the case.

The judge ordered a verdict for the defendant, and at the request of the plaintiff reported the case for determination by this court.

If the ruling was right, the verdict was to stand; otherwise, such entry was to be made as the court should order.

H. M. Channing & J. P. Jackson, Jr., for the plaintiff.

S. M. Child, for the defendant.

CARROLL, J. When the plaintiff was appointed conservator of Anna W. Meeker, she (Meeker) had a checking account, so called, with the defendant. Subsequently deposits were made by the plaintiff as such conservator to the credit of the account. There was evidence that before the death of the ward, June 30, 1913, and at the time of her death, the account stood on the defendant's books, "Frederick K. Day, Conservator for Anna W. Meeker." The executor of the will of Anna W. Meeker filed with the defendant a copy of his appointment and the defendant paid him, without the knowledge or consent of the plaintiff, the entire deposit, amounting to $18,254.84. This action is to recover that sum. In the Superior Court a verdict was ordered for the defendant. The case is before us on a report.

The provisions of law relative to the management of the property of an insane person by a guardian apply to a conservator, R. L. c. 145, § 41, and he is to give such bond as is required of the guardian. St. 1910, § 95. The title to property purchased with a ward's money ordinarily is in the ward's name. The conservator has the care and management of it but does not own it; and the ward must be a party in all actions which concern the title. *Lombard* v. *Morse*, 155 Mass. 136. *Taylor* v. *Lovering*, 171 Mass. 303. *Brock* v. *Rogers*, 184 Mass. 545. But where a contract is made with the conservator in his own name, he binds himself but does not bind the ward or her estate; and when the title to property is in him personally, the right to recover it is in the conservator and such action must be brought in his name. *Rollins* v. *Marsh*, 128 Mass. 116. *Brewster* v. *Seeger*, 173 Mass. 281, 282. *McLean* v. *Dean*, 66 Minn. 369. *Chapman* v. *Goodrich*, 55 Vt. 354. *McKinney* v. *Jones*, 55 Wis. 39. *Jolliffe* v. *Higgins*, 6 Munf. 3. *Thomas* v. *Bennett*, 56 Barb. 197. *Slaymaker* v. *Farmers' National Bank of Lancaster*, 103 Penn. St. 616.

Although the particular funds when deposited became the property of the defendant trust company, *Laighton* v. *Brookline Trust Co.* 225 Mass. 458, if they were not deposited to the ward's credit but were in the name of "Frederick K. Day, Conservator for Anna W. Meeker," the defendant became indebted to the plaintiff. Under these circumstances it agreed to hold the funds sub-

ject to his order and to pay on his demand; the title was in him, not in Anna W. Meeker, and on the defendant's refusal he could bring an action to recover the amount of the deposit. *City National Bank* v. *Charles Baker Co.* 180 Mass. 40. See *Rollins* v. *Marsh, supra; Carr* v. *Leahy,* 217 Mass. 438; *Boone* v. *Citizens' Savings Bank,* 84 N. Y. 83.

While the death of the ward ended the authority of the conservator, *Loring* v. *Alline,* 9 Cush. 68, the title to the deposit, if it stood in his name, belonged to the plaintiff; he was a creditor of the defendant and continued so after the ward's death. The defendant could not legally deprive him of the money or pay it to another without his consent. If during the lifetime of Anna W. Meeker he could bring an action in his own name to recover the credit, the termination of the relation of conservator and ward did not deprive him of this right. In *Brewster* v. *Seeger, supra,* a note and mortgage of real estate were given to one Perry, "as he is guardian" of Elsie S. Adams, a minor. After she became of age and married, Perry assigned the mortgage. It was held that the assignment was valid; that as the legal title was in Perry he could transfer it, and the coming of age of the ward had no effect on it. *McLean* v. *Dean, supra. Zachary* v. *Gregory,* 32 Texas, 452. *Chambless* v. *Vick,* 34 Miss. 109. *Huntsman* v. *Fish,* 36 Minn. 148.

There is no suggestion in the record that the funds have been diverted, and depositing them in the name of the plaintiff as conservator of the ward instead of in the ward's name does not amount to a conversion of the money. *Brown* v. *Dunham,* 11 Gray, 42. *Tarbell* v. *Jewett,* 129 Mass. 457. *Peabody* v. *North,* 161 Mass. 525, 528.

It is not necessary in this case to decide whether the executor or the conservator of the ward is entitled to a deposit standing in her name but under the control of the conservator and subject to his withdrawal during her lifetime before the adjustment of his accounts in the Probate Court. His authority terminated by the ward's death; his only duty was to settle his accounts in the Probate Court and pay what remained to the executor. Even where the conservator has merely the possession or custody of the ward's property, he has the right to have his accounts settled and the amount due to or from him determined in the Probate Court before he can be called upon to pay the balance in his hands, if

any, to the executor. He may pay the necessary expenses and retain the sum allowed by the court as compensation for his services, but these amounts are to be determined upon the allowance of his accounts in the Probate Court, and, until these proceedings are taken, the conservator holds possession of the property and is not liable to be sued at common law by the ward or her executor. *McLean* v. *Curran*, 133 Mass. 531. *Murray* v. *Wood*, 144 Mass. 195. *Wilson* v. *Boylston National Bank*, 170 Mass. 9. *Green* v. *Gaskill*, 175 Mass. 265, 269. *Moyer* v. *Bray*, 227 Mass. 303, and cases cited.

The report of the judge of the Superior Court states: "At the trial the allegations and facts set forth in the answer of the defendant were admitted to be true." The answer contains the statement, "that the defendant thereafter held said property and all subsequent deposits made to the credit of said account as the property of said Meeker, but subject to the control of the plaintiff and the court during the lifetime of said Meeker, provided said Day should so long be conservator of said estate." The exact meaning of this statement in the answer is not clear. Its exact significance need not be determined because at a new trial the facts may be stated or found in plainer form. If it is a mere conclusion of law the plaintiff is not bound by it because of his agreement that the facts set forth in the answer were true. Even if it is a statement of fact, the ruling given was wrong because, notwithstanding the plaintiff's admission, in view of the evidence, it was for the jury to say whether the contract was made with the plaintiff and the deposit stood in his name.

Against the objection of the plaintiff the defendant introduced a petition for partial distribution of the estate of Anna W. Meeker, including the money deposited with the defendant, to which petition the plaintiff was a party. This question was not raised by the answer and was inadmissible. *Friedenwald Co.* v. *Warren*, 195 Mass. 432, 434. *Gilson* v. *Nesson*, 208 Mass. 368, 370.

The defendant contends that the plaintiff is estopped from now claiming the fund because he was a party to the petition for distribution brought by the executor. Even if the question were open under the pleadings, the plaintiff's rights against the defendant are not lost because of this proceeding. *Jennings* v. *Wall*, 217 Mass. 278, 281. *Deans* v. *Eldredge*, 217 Mass. 583.

As there was evidence that the account stood in the name of "Frederick K. Day, Conservator for Anna W. Meeker," there was a question for the jury, and it was error to direct a verdict for the defendant.

It follows that there must be a new trial: and it is

So ordered.

FLORENCE V. C. PARSONS, executrix, *vs.* INHABITANTS OF LENOX.

Berkshire. June 25, 1917. — September 24, 1917.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Tax, Abatement.

Where a testator died in France on December 1, 1911, being at the time of his death a resident of a town in this Commonwealth, and where the assessors of that town gave notice on April 1, 1912, requiring lists of property to be brought to them on or before May 15, 1912, and a commissioner appointed under St. 1909, c. 490, Part I, § 79, found that the executrix of the testator's will did not have a full and accurate knowledge of the property and estate of the testator until after May 15, 1912, and could not have made before that time a full, complete or accurate list of all such property and that she had "a reasonable excuse for failure to file a list before May 15, 1912," and where the executrix was in the town of the testator's residence from June until October, 1912, and during that time had no reason for not knowing about the property and estate of her testator, but did not file any such list of his taxable property until January, 1913, it was *held*, that this failure to file the list as soon as the cause for delay was removed was not a compliance with the requirement of St. 1909, c. 490, Part I, § 73, so that the condition precedent to an abatement of the taxes upon the estate of the testator for the year 1912 had not been performed, and accordingly that such an abatement could not be made.

Want of knowledge of the law requiring the filing of such a sworn list is no excuse for delay in the filing.

In the case described above it appeared that the sworn list of taxable property which was filed by the testatrix in January, 1913, was sworn to before a notary public, and it was *said*, that, the time for a seasonable filing then having elapsed, it was not necessary to consider whether the jurat would have been sufficient under St. 1909, c. 490, Part I, § 43, which provides that, "If the person . . . bringing such list is absent from the place in which the tax is to be assessed during the whole period when such oath may be made, it may be administered by a notary public."

PETITION, filed in the Superior Court on June 2, 1913, by the executrix of the will of David W. Bishop, late of Lenox, who

died at Paris, France, on December 1, 1911, under St. 1909, c. 490, Part I, § 77, for the abatement of a tax assessed on the estate of the testator for the year 1912, and, after a partial abatement by the assessors, paid under protest by the petitioner.

The case was referred to a commissioner, appointed under St. 1909, c. 490, Part I, § 79, "to hear the parties and their evidence and report his findings to the court together with such facts and questions of law as either party may request."

The case was heard by *Jenney*, J., upon the commissioner's report and an agreed statement of facts supplemental thereto. The judge made an order confirming the findings of fact set forth in the commissioner's report and made a decree that the taxes assessed against the petitioner in the sum of $7,450.79 and paid by her under protest on May 31, 1913, as alleged in the petition, be abated and that judgment be entered for the petitioner in the sum of $7,450.79 with interest thereon in the sum of $1,657.80 together with taxable costs. At the request of the parties, the judge reported the case upon the pleadings, the commissioner's report, the agreed statement of facts, the findings of the judge and the order of judgment thereon for determination by this court.

St. 1909, c. 490, Part I, § 43, is as follows: "The assessors shall in all cases require a person, firm or corporation bringing in a list to make oath that it is true. The oath may be administered by any of the assessors or by their secretary or head clerk. If the person, firm or corporation bringing such list is absent from the place in which the tax is to be assessed during the whole period when such oath may be made, it may be administered by a notary public, whose jurat shall be duly authenticated by his seal."

The case was submitted on briefs.

H. Parker, C. E. Hibbard & T. D. Hewitt (of New York), for the petitioner.

G. A. Mole, J. F. Noxon & M. L. Eisner, for the respondent.

CARROLL, J. This is a petition under St. 1909, c. 490, Part I, § 77, for an abatement of taxes for the year 1912, assessed upon the estate of David W. Bishop, a resident of Lenox in this Commonwealth, who died in Paris, France, December 1, 1911. The petitioner is the mother of the testator and the executrix of his will, which was proved and allowed in the Surrogate's Court of the County of New York in the State of New York, on or about

March 7, 1912, and in the Probate Court for Berkshire County, February 4, 1913.

The assessors of the respondent town, on or about April 1, 1912, caused to be posted in three public places in Lenox notices requiring lists of property to be brought to them on or before May 15, 1912. St. 1909, c. 490, Part I, §§ 41, 42, 43. St. 1909, c. 515. No list was filed with the assessors by the petitioner within the time stated in the notice. In December, 1912, a list was mailed from the city of New York, where Mrs. Parsons, the petitioner, resided, directed to the assessors of Lenox. This list was not sworn to and subsequently was withdrawn for corrections. A second list, sworn to before a notary public, was filed with the assessors January 10, 1913; and a third list, sworn to before a notary, was filed in March, 1913.

At the time of the annual assessment, in addition to an assessment of real estate, furniture and tangible property which is not in dispute, an assessment was made "on other ratable personal property" in the sum of $500,000, representing a tax at the Lenox tax rate for 1912 of $5,500. A second assessment of $500,000 of personal property, omitted from the former assessment, was made within the time required by St. 1909, c. 490, Part I, § 85. St. 1911, c. 89. See *Gannett* v. *Cambridge*, 218 Mass. 60. It is in connection with the two assessments of $500,000 each and the tax of $11,000 that these proceedings were commenced. The tax bill for $5,500 on the first assessment was sent September 1, 1912. The bill for the omitted assessment was sent on or about January 1, 1913. The value of the estate was found by the commissioner to be $450,569.91, as stated in the third list filed. In March, 1913, following the filing of the last list, the petitioner asked for an abatement, in consequence of which the tax of $11,000 was reduced by the sum of $3,549.21. This tax, as abated, was paid under protest on May 31, 1913.

It was found by the commissioner that the testator's personal property "at the time of his death and until the close of his estate was physically situated outside the Commonwealth of Massachusetts, except for an undivided half interest in certain furniture and other household effects located on the real estate in Lenox." "He [the testator] had at the time of his death considerable property in France, and his other tangible property, as well as all

his securities, were physically present at the time of his death and until his estate was closed in New York County, in the State of New York."

On the third of April, 1912, the petitioner left the United States and went to Paris, where she was engaged in the collection, management and disposition of her son's property until her return to the United States, May 13, 1912. The testator's "affairs in France [were] in such shape as to require her [the petitioner's] attention and presence." The commissioner found that the petitioner did not have a full or accurate knowledge of all the property and estate of the testator until after May 15, 1912, and could not before that time have made a "full, complete, and an accurate list of all such property;" that she had "a reasonable excuse for failure to file a list before May 15, 1912."

No finding was made that there was good cause for the delay subsequent to May 15 and continuing until January 10, 1913, when the first sworn list was filed with the assessors. It also appears that Mrs. Parsons came to Lenox early in June, 1912, and remained there until October 1 of that year.

Where a taxpayer seeks an abatement of an excessive tax before the assessors, (unless the tax exceeds by more than fifty per cent the amount which would have been assessed if the list had been seasonably brought in,) no part of the tax assessed on his personal property shall be abated if he has failed to file the list within the time specified in the notice, under St. 1909, c. 490, Part I, § 41, (see now St. 1914, c. 198, § 5,) unless he shows to them "a reasonable excuse for the delay." St. 1909, c. 490, Part I, § 73.

On appeal, either to the county commissioners or to the Superior Court, no abatement of the tax shall be made if the list required to be returned to the assessors was not brought in within the time specified in Section 41, unless it is found "that there was good cause for the delay," or unless the assessors have so found. St. 1909, c. 490, Part I, §§ 76, 77.

The filing of the list within the specified time is a condition precedent to the abatement of an excessive tax, unless there was a reasonable excuse or good cause for the delay. *Sears* v. *Nahant*, 205 Mass. 558. *Charlestown* v. *County Commissioners*, 101 Mass. 87.

The time for filing the list expired May 15, 1912. If we assume,

on the findings of the commissioner, that the petitioner was excused for good cause from filing the list at the time specified, no reason is shown why the list should not have been filed as soon as the cause for delay was removed. The petitioner was in Lenox from June until October and during that time presumably had knowledge of the property and estate of the testator. No sworn list was given to the assessors until after the assessment of omitted personal property was made in December, 1912. This was not in accordance with the requirements of the statute. To recover under the tax statute it must be complied with; and the petitioner, failing in this, cannot recover. See, in this connection, *Porter* v. *County Commissioners*, 5 Gray, 365; *Osborn* v. *Danvers*, 6 Pick. 98.

The petitioner's want of knowledge of the law requiring the filing of the list is no excuse. Even under the workmen's compensation act ignorance of the law has been held to be no excuse for failure to comply with the provisions of the act. *Fells's Case*, 226 Mass. 380.

On or about November 1, 1912, the chairman of the assessors stated to a representative of the petitioner that in order to secure an abatement of the taxes "she would have to file a statement and that a statement would be received." The assessors could not waive the provisions of the statute and the commissioner has found there was no waiver. *Boston Rubber Shoe Co.* v. *Malden*, 216 Mass. 508, and cases cited.

The conversation of November, 1912, with the assessors, affords no excuse for the failure to file the list before that time, nor is it an excuse for the delay until January of the following year.

As the petitioner had not filed the list within the time required by the notice, and no good cause is shown for the subsequent delay after May 15, 1912, it is unnecessary to discuss the question whether the list sworn to before the notary public was executed as required by St. 1909, c. 490, Part I, § 43, see *Amherst College* v. *Amherst*, 193 Mass. 168, or whether the petition for abatement, of March 23, 1913, was filed within the time required by law. St. 1909, c. 490, Part I, § 72. There is nothing in *Great Barrington* v. *County Commissioners*, 112 Mass. 218, 223, *Wright* v. *Lowell*, 166 Mass. 298, 302, *Chase* v. *Boston*, 193 Mass. 522, 527, at variance with what is here stated. Nor is it necessary to consider the effect of the probate of the will in New York before its probate in this

Commonwealth; see, in this connection, *Rackemann* v. *Taylor*, 204 Mass. 394.

On the facts found by the commissioner, the case at bar is not within the rule stated in *Putnam* v. *Middleborough*, 209 Mass. 456 and *Gray* v. *Lenox*, 215 Mass. 598. See *Hemenway* v. *Milton*, 217 Mass. 230.

The result is that, as the testator at the time of his death was a resident of Lenox in this Commonwealth, and as no list was filed as required by the statute, see *Frothingham* v. *Shaw*, 175 Mass. 59, *Welch* v. *Boston*, 221 Mass. 155, *Sullivan* v. *Ashfield*, 227 Mass. 24, the petition must be dismissed and judgment entered for the respondent.

So ordered.

FREDERICK K. DAY, conservator, *vs.* JOHN L. NICHOLS, executor.

Middlesex. March 30, 1917. — September 25, 1917.

Present: RUGG, C. J., DE COURCY, CROSBY, & PIERCE, JJ.

Probate Court, Appeal. *Supreme Judicial Court. Conservator.*

Under R. L. c. 162, § 23, which gives to the Supreme Judicial Court on an appeal from a decree of the Probate Court the power to "enter such decree thereon as the Probate Court ought to have entered . . . or make any other order therein, as law and justice may require," the authority of the appellate court is limited necessarily to the issues heard and determined in the Probate Court, and the statute cannot be construed to confer on the Supreme Judicial Court jurisdiction to determine matters not necessarily involved in the determination of the issues before the Probate Court.

Accordingly on an appeal from a decree of the Probate Court allowing with certain modifications the accounts of a conservator of the property of a deceased ward, the allowance of which was opposed by the executor of the will of the ward, it was *held* that the single justice who heard the appeal was right in refusing as matter of law to allow charges of the conservator for services of counsel rendered and expenses incurred after the decree of the Probate Court was made, and it was *said* that the conservator must seek relief by the presentation of a supplemental account in the Probate Court.

In the same case it was *held* that such charges could not be allowed as costs and expenses under R. L. c. 162, § 44, because under the circumstances of the case the account allowed was not a final account nor in the nature of a final account.

In the same case it was *held* that a finding of a master in regard to the account of

the conservator, that it was prudent for the conservator to leave deposited in a trust company uninvested a balance of from $1,200 to $2,000, earning only two per cent, could not be said to be clearly erroneous, where the master also found that the condition of the ward was such that at any time the conservator "might be called upon to defray the cost of doctors, nurses and attendants" and also of the removal of the ward to an asylum and of treatment there.

In the same case the master found that certain presents of money and furs by the conservator to the persons who had personal custody of the ward were made solely for what the conservator conceived to be the interest and benefit of the ward, that the expense to the estate of the gifts was small and that the results were of inestimable value to the ward, and it was *held* that the payments for the presents were wise and judicious expenditures of the money of the ward.

In the same case it appeared that it was necessary for the conservator to attend the funeral of the ward and that he made a charge for expenses incurred in attending the funeral, but there was no evidence to show the amount of such expenses, and it was *held* that an exception to the master's finding must be overruled.

In the same case certain charges of the conservator related to the collection by him of money due on a policy of the Massachusetts Hospital Life Insurance Company and it appeared that by the terms of the policy, which was called an "annuity in trust," the principal sum was to be paid "to the said conservator or his successors," and it was *held* that the collection of the money due on the policy was proper and that all reasonable expenses incidental to its collection were incurred properly by the conservator.

In the same case the evidence relating to the reasonableness of the charges of the conservator for his own services was not reported, but the master's conclusion of fact, that the charges were reasonable, was in accordance with the evidentiary facts reported by the master and was affirmed by the single justice who heard the case, and it was *held* that an exception to the finding must be overruled.

Upon cross appeals taken by an executor and by the conservator of the property of the testatrix from a decree of the Probate Court allowing with certain modifications the account of the conservator, the question of taxable costs rests wholly in the discretion of the single justice who hears the appeals.

CROSS APPEALS to the Supreme Judicial Court from a decree of the Probate Court of the county of Middlesex allowing with certain modifications "the first and final account and supplemental account" of Frederick K. Day, as conservator of the property of Anna W. Meeker, late of Newton, who died on June 30, 1913, the first appeal being taken by the conservator named and the other appeal being taken by John L. Nichols, the executor of the will of Anna W. Meeker.

In the Supreme Judicial Court the case was referred to a master upon both appeals. Later the case was heard by *Braley*, J., upon the exceptions to the master's report. The twenty-three exceptions filed by John L. Nichols, executor, are described in the opinion sufficiently for an understanding of the disposition of them

made by the court. The single justice made the following memorandum of decision:

"At the hearing before me on the entry of a final decree counsel for the conservator asked me that the conservator should be allowed the following sums incurred by him subsequent to the decree of the Probate Court: Compensation for his services, $880.00, Pocket expenses, $195.60, Disbursements of counsel, $10.72, Charge for recording and transcription of evidence at the request of the master, $66.15, Services of counsel, $2,060.00.

"Independently of any question of discretion I ruled as matter of law that none of these amounts should be allowed, and ordered them omitted from the final decree."

By order of the justice a final decree was entered modifying the decree of the Probate Court in accordance with the master's report, and affirming the decree of the Probate Court as so modified, remanding the case to that court for further proceedings in accordance with the final decree and ordering that execution issue for taxable costs of suit to be paid by John L. Nichols, executor. Both John L. Nichols, executor, and Frederick K. Day, conservator, appealed from the final decree.

R. L. c. 162, § 23, is as follows: "The Supreme Judicial Court may, upon appeal, reverse or affirm, in whole or in part, any decree or order of the Probate Court, and may enter such decree thereon as the Probate Court ought to have entered, may remand the case for further proceedings, or make any other order therein, as law and justice may require."

R. L. c. 162, § 44, is as follows: "In cases which are contested before a probate court or before the Supreme Court of Probate, costs and expenses in the discretion of the court may be awarded to either party, to be paid by the other party, or they may be awarded to either or both parties, to be paid out of the estate which is the subject of the controversy, as justice and equity may require. If costs are awarded to be paid by one party to the other, execution may issue."

H. M. Channing & J. P. Jackson, Jr., for the conservator.

S. M. Child, for the executor.

PIERCE, J. The conservator asks this court to direct a modification of the decree of the single justice, to the purpose and end that the defendant, John L. Nichols, as executor, be ordered to

pay to Frederick K. Day $2,007.81, the amount established to be due to Day by the final decree, and also, that Nichols personally be ordered to pay to the plaintiff the taxable costs and the reasonable expenses and charges incurred and rendered by him in the contests over his accounts, both in the Probate Court and in the Supreme Judicial Court.

The power of this court on appeal to "enter such decree thereon as the Probate Court ought to have entered . . . or make any other order therein as law and justice may require," R. L. c. 162, § 23, is necessarily limited to the issues heard and determined by the Probate Court, and the statute rightly cannot be construed to confer on this court original jurisdiction to determine rights and controversies not necessarily involved in the determination of the matters in issue before the Probate Court.

The question of the obligation of the estate to reimburse the conservator for payments made and expenses incurred on behalf of the ward, and the further question of any individual obligation of the executor on the facts manifestly were not and could not have been considered by the Probate Court and therefore an appeal cannot be considered by this court. The conservator must seek relief through the allowance of a supplemental account in the Probate Court. *Munroe* v. *Holmes*, 9 Allen, 244; *S. C.* 13 Allen, 109. *May* v. *Skinner*, 152 Mass. 328. *Horton* v. *Robinson*, 212 Mass. 248. The request to be allowed reasonable expenses and charges under R. L. c. 162, § 44, was denied rightly under the circumstances of this case, because the account allowed was not a final account or in the nature of a final account. Upon the determination of the action of *Day* v. *Old Colony Trust Co. ante*, 225, the relief can be sought in a supplementary account in the Probate Court. *Ensign* v. *Faxon*, 224 Mass. 145. *Loring* v. *Wise*, 226 Mass. 231.

On appeal the cases were sent by the single justice to a master "to hear the parties and report his findings to the court, together with such facts and questions of law as either party may request." The master made findings of fact but made no report of the evidence. Upon the coming in of the report the executor, John L. Nichols, duly filed twenty-three exceptions thereto. He also filed a motion to recommit the report to the master with instructions to find specifically and in detail the dates, nature, kind and subject

of the legal services of H. E. Bolles and of the conservator, Day. The single justice denied the motion to recommit, overruled the exceptions, and confirmed the report.

The first, second and third exceptions are but objections to the statements by the master of subsidiary facts descriptive of the conditions and circumstances of the ward, a knowledge of which is valuable if not needful to a clear understanding of the duties the conservator was required to undertake to perform. These exceptions were overruled rightly.

The fourth exception relates to a controversy between the executor and the conservator as to whether Nichols had agreed to pay the taxes of 1907 and 1908 as a part of the obligation of Nichols upon a note payable to the ward. The question is quite remote from any issue of accounting and the exception was overruled rightly.

The fifth exception relates to a claim made upon Nichols for certain travelling expenses, incurred, as the master finds, by reason of attempts made by Day to collect the note of Nichols. These demands were not allowed and the exception was immaterial and was rightly overruled.

The sixth exception, relating to the finding of the master that it was prudent to carry a balance of $1,200 to $2,000, earning two per cent in the Old Colony Trust Company, cannot be sustained as clearly erroneous in view of the further finding of the master that the condition of the ward "was such that at any time" the conservator "might be called upon to defray the cost of doctors, nurses and attendants," as also of the removal of the ward to an asylum and of treatment there.

The seventh and eighth exceptions are not argued and are treated as waived.

The ninth exception relates to certain presents of money and furs to the persons who had personal custody of the ward. The master finds these presents were made solely for what the conservator conceived to be the interest and benefit of the ward; that the conservator sought through the gifts to insure to the ward the solicitous care of attendants, and additional, continuous and patient watchfulness and devotion. The master also found that the expense to the estate was small, and that the advantages were of inestimable value to the ward. In these circumstances we

are of opinion that the gifts or presents were wise and judicious expenditures of the property of the ward. This exception was overruled rightly. *May* v. *May*, 109 Mass. 252, 256.

The tenth and nineteenth exceptions relate to the reasonableness of any charge for expenses incurred in attending the funeral of the ward. There is nothing in evidence to show the amount of such expenses and it appears that there was a real necessity for such an attendance. The exceptions must be overruled.

The eleventh, twelfth and twentieth exceptions relate to the collection of money due on the policy of the Massachusetts Hospital Life Insurance Company and to the expenses incurred in so doing. An examination of the "Annuity in Trust" policy discloses that the principal sum was to be paid "to the said conservator or his successors" by the terms of the trust instrument. The collection of the money due and all reasonable expenses incidental thereto, were proper to be done and incurred. These exceptions must be overruled.

The thirteenth exception relates to the reasonableness of the charges of the conservator for his compensation. The evidence is not reported, the master was not bound to report it. *Martin* v. *Barnes*, 214 Mass. 29. The conclusions of fact follow from the reported evidentiary facts, they are affirmed by the single justice, they do not appear to be clearly wrong. The exception must be overruled. *Marcus* v. *Dyer*, 174 Mass. 64.

The fourteenth, fifteenth, sixteenth and seventeenth exceptions are either immaterial or are covered by previous exceptions and must be overruled.

The eighteenth exception is covered by the ninth exception and must be overruled.

The twenty-first exception is waived.

The remaining exceptions relate to the restatement of the account of the conservator made necessary by the findings of the master, and must be overruled.

The question of taxable costs on cross appeals rests in the discretion of the judge.

It follows that the decree must be affirmed.

So ordered.

RIVERBANK IMPROVEMENT COMPANY vs. SARAH A. CHADWICK & others, trustees, & others.

Suffolk. March 22, 23, 1917. — October 8, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Equitable Restrictions. Land Court. Constitutional Law, Taking property for private purpose with full compensation cannot be authorized. *Eminent Domain. Real or Personal Property.*

Equitable restrictions are real estate as a part of the land to which they are appurtenant.

St. 1915, c. 112, purporting to confer on the Land Court jurisdiction "to hear and determine the question whether or not equitable restrictions arising under contracts, deeds or other instruments, limiting or restraining the use or the manner of using land are enforceable in whole or in part," and undertaking to authorize that court, if it shall find that the restrictions are valid though not enforceable, to refer the case to the Superior Court for the ascertainment of damages, and, "at any time after such assessment for the benefit of the persons or property entitled thereto," giving a petitioner under the statute the right to pay the amount of damages with interest into the Superior Court, and providing that, upon certification of the fact of such payment to the Land Court, that court may register the title to the petitioner's land free from restrictions, is unconstitutional and void, because the taking of property for a private purpose without the consent of its owner upon payment of full compensation is a violation of arts. 1, 10 of the Declaration of Rights and cannot be authorized by statute.

PETITION, filed in the Land Court on January 15, 1916, by the Riverbank Improvement Company, a corporation organized under the laws of this Commonwealth, under St. 1915, c. 112, as the owner of certain land with the buildings thereon on Commonwealth Avenue in Boston, alleging that the petitioner's land was encumbered of record by certain restrictions, the enforcement of which would be inequitable and injurious to the public interest, and praying that the petitioner's land might be registered free and clear from such restrictions in accordance with the provisions of the statute.

The case was heard by *Davis*, J., who made a decision determining among other things, that certain of the restrictions in question, which prohibited the erection of "any building costing, with the usual L or out-buildings, less than $15,000" and also pro-

hibited "the use of any building for an apartment house" or "for mercantile purposes," should not be enforced. The respondents appealed from the decision.

St. 1915, c. 112, is as follows:

"SECTION 1. The Land Court shall have jurisdiction upon a petition to register land, or if land has been previously registered, upon a supplemental petition by the owner or owners thereof, to hear and determine the question whether or not equitable restrictions arising under contracts, deeds or other instruments, limiting or restraining the use or the manner of using land are enforceable in whole or in part.

"SECTION 2. If the Land Court shall find and determine, after a hearing, that the enforcement of such restrictions or limitations, or any of them, would be inequitable or injurious to the public interests, it shall register title to the land free from said restrictions as and to the extent required by the equities of the case or by the public interests; or, in case of registered land, shall enter such order as may be appropriate therefor: provided, however, that if the Land Court shall find and determine that such restrictions or limitations, or any of them, though they ought not to be enforced are nevertheless valid and have not become inoperative, illegal or void because contrary to law or injurious to the public interest, it shall, before registering said land free from said restrictions or limitations or any of them as aforesaid, ascertain and determine whether any person or property entitled to the benefits of such restrictions or limitations, or any of them, may be damaged by the non-enforcement of the same. If so, the case shall be referred to the Superior Court for the assessment of such damages. The amount of any damages so assessed, with interest thereon from the date of such assessment to the date of payment, at the rate allowed by law upon judgments, may be paid into the Superior Court at any time after such assessment for the benefit of the persons or property entitled thereto; and if so paid the clerk of the Superior Court shall so certify to the Land Court. If no damages shall be awarded the clerk of the Superior Court shall certify that fact to the Land Court. Upon such certification from the clerk of the Superior Court of the final determination of such proceedings for assessment and of the payment of any damages therein assessed, the title may be registered free from any restrictions, or in case of

registered land may be freed therefrom by the entry of such order as may be appropriate therefor.

"SECTION 3. Any party aggrieved by a finding or decision of the Land Court that the enforcement of such restrictions or limitations, or any of them, would be inequitable or injurious to the public interests, may appeal therefrom to the Supreme Judicial Court, which shall have power to draw from the facts and instruments stated in the record, findings or decision any inferences of fact that might have been drawn therefrom at a trial, and to reverse or order such modification of said findings or decision as justice may require. The appeal shall be taken within twenty days after receipt of notice of the filing of such finding or decision, and further proceedings under section two shall be suspended until after the determination of said appeal. If an appeal is not duly prosecuted, the finding or decision shall stand as if no appeal had been taken.

"SECTION 4. This act shall take effect upon its passage."

A. L. Taylor, for the respondents the Chadwick trustees and the Ladensack trustees.

P. N. Jones, for the respondent Fannie E. Hurlburt.

Lee M. Friedman, (*J. P. Carr* with him,) for the respondent the Congregation Adath Israel.

J. D. Graham, for the respondents Eugene B. Hagar and Anna H. Stone.

K. Howes, for the respondent Frederick A. Washburn.

B. Corneau, (*R. F. Hooper* with him,) for the petitioner.

RUGG, C. J. This is a petition under St. 1915, c. 112, for the registration of lands of the petitioner situated in Boston. The general scope of that act, so far as it relates to facts presented on this record, may be stated briefly.

Jurisdiction is conferred by § 1 upon the Land Court to hear and determine in a petition for the registration of land the question "whether or not equitable restrictions arising under contracts, deeds or other instruments, limiting or restricting the use or the manner of using land are enforceable in whole or in part." It is provided by § 2 that if the Land Court shall find that "the enforcement of such restrictions or limitations, or any of them, would be inequitable . . . it shall register title to the land free from said restrictions as and to the extent required by the equi-

ties of the case . . . provided, however," that if that court shall find that the restrictions are valid though not enforceable, it shall ascertain whether any person or property entitled to the benefits of such restrictions or limitations may be damaged by their non-enforcement, and if it so finds, the case shall be sent to the Superior Court for an assessment of such damages. The option is given to pay the amount of damages with interest "into the Superior Court at any time after such assessment for the benefit of the persons or property entitled thereto," and upon certificate to the Land Court of the fact of such payment the title may be registered free from restrictions.

The Land Court has found that the land of the petitioner is subject to equitable restrictions requiring that no buildings costing less than $15,000 shall be erected upon the lots and prohibiting "the use of any building for an appartment house" or "for mercantile purposes," in favor of land owned by some of the respondents; that such restrictions "are valid and have not become inoperative, illegal or void;" that the removal of these restrictions "would result in material damage, not only sentimentally, but pecuniarily," and would render the dwelling houses of some of the respondents "less desirable as residences, and would depreciate their value" and "render their houses unfit for occupancy for the purpose for which they were erected." It also was found that there had been no violation of the restrictions within the restricted area. The restrictions were established by the owners, chief among whom was the petitioner, in the expectation that the area to which they applied would be bought for the erection of expensive buildings each devoted to a private residence. The construction of subways, the extension of means of rapid transit, and the general use of the automobile has rendered homes in the suburbs of Boston far more accessible than when the scheme of restrictions for this area was put in operation. By reason of these and perhaps other causes, the restricted area is unavailable for the uses for which these restrictions were designed, and by far the larger part of it has not been built upon. The Land Court found that it would be "inequitable" to enforce the restrictions as to cost of buildings, and prohibiting their use for apartment houses and mercantile purposes, leaving other restrictions intact.

The question is whether the statute is constitutional in its op-

ration upon the facts here presented by permitting the petitioner to have the damage which would be caused by the non-enforcement of these restrictions assessed, and to pay such damages and thus extinguish those restrictions.

An equitable restriction, such as has been found to exist in the case at bar, has been said to be "an easement, or servitude in the nature of an easement," *Peck* v. *Conway*, 119 Mass. 546, 549, "a right in the nature of an easement," *Beals* v. *Case*, 138 Mass. 138, 140, *Codman* v. *Bradley*, 201 Mass. 361, 368, and an "interest in a contractual stipulation which is made for their common benefit," *Evans* v. *Foss*, 194 Mass. 513, 515. It is an "equitable servitude" as to which commonly no action at law is open. *Childs* v. *Boston & Maine Railroad*, 213 Mass. 91. It was said in *Bailey* v. *Agawam National Bank*, 190 Mass. 20, "The so called equitable restriction results from the fact that equity will enforce the agreement against those taking with notice in favor of the then owner of the land to be benefited. Equity does not enforce the agreement because there is an equitable restriction." In *Sprague* v. *Kimball*, 213 Mass. 380, 382, occur these words: "It is not a covenant running with the land at law, but it is an equitable easement or servitude passing with a conveyance of the premises to subsequent grantees. *Parker* v. *Nightingale*, 6 Allen, 341. . . . While only the mode of use is regulated and the fee passed, yet the estate is encumbered with the inherent restrictions which create an equitable, enforceable interest." It follows from these and other decisions that such an equitable restriction is a property right in the person in favor of whose estate it runs or to which it is appurtenant. That has been expressly recognized or impliedly assumed in numerous decisions and is not now open to doubt. *Linzee* v. *Mixer*, 101 Mass. 512. *Wilson* v. *Massachusetts Institute of Technology*, 188 Mass. 565. *Stewart* v. *Finkelstone*, 206 Mass. 28. *Lodge* v. *Swampscott*, 216 Mass. 260. The extent of its enforceability and its value under varying circumstances are questions quite apart from its inherent nature as between private owners. See *United States* v. *Certain Lands*, 112 Fed. Rep. 622; *S. C.* on appeal *sub nomine; Wharton* v. *United States*, 83 C. C. A. 58.

It is a necessary corollary of these decisions defining the nature of equitable restrictions that they are real estate. They are part and parcel of the land to which they are attached and with which

they pass by conveyance. *Hartt* v. *Rueter*, 223 Mass. 207, 212. *Massachusetts Institute of Technology* v. *Boston Society of Natural History*, 218 Mass. 189.

The effect of the instant statute as applied to these facts is to extinguish this right as affecting the land described in the petition so far as found to exist in the respondents, not for any public use nor to subserve any public end, but merely for the benefit of other private landowners whose estates are less valuable by reason of the existence of the right and who could make more advantageous and profitable uses of their own land if these incumbrances were out of the way. It has been found expressly that the enforcement of the restrictions would "not be injurious to the public interests." That finding must be accepted as final and true. Each of the respondents is to be forced against his will to surrender his right in the nature of an easement in the land of another when it is not "inoperative, illegal or void" according to the decision of the Land Court. He will be obliged to make surrender of this real estate right and accept money damages in place of it, not because demanded by the public interests, but because a neighbor desires it for his private aims. This is plain from the bald statement of the facts. It is supported by numerous authorities where the matter is discussed at large. *Lowell* v. *Boston*, 111 Mass. 454. *Opinion of the Justices*, 204 Mass. 607. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371. *Opinion of the Justices*, 211 Mass. 624. *Palairet's Appeal*, 67 Penn. St. 479. It was said in *Hairston* v. *Danville & Western Railway*, 208 U. S. 598, 606, "The courts of the States, whenever the question has been presented to them for decision, have, without exception, held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required." *Madisonville Traction Co.* v. *Saint Bernard Traction Co.* 196 U. S. 239, 251.

The finding of the Land Court as to the enforcement of the restrictions here in question is framed in apparent accordance with the principle of law laid down in *Jackson* v. *Stevenson*, 156 Mass. 496. That principle in substance is that a court of chancery will refuse at the suit of the owner of the restrictions to enforce equitable restrictions when "it would be oppressive and inequitable

to give effect to the restrictions," but will assess the damages caused by the interference of which complaint is made. A property right in the nature of real estate incident to the ownership of land, even though it cannot be enforced specifically in equity, is a property right different in kind from money damages assessed for the extinguishment of that property right. It was said in *Attorney General* v. *Williams*, 174 Mass. 476, 480, "if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner." That principle is precisely applicable to the statute at bar. If the use for which the property is taken is not public, it is of no consequence that ample provision is made for compensation to the owner.

It may be that it would be wiser for the respondents to receive money damages and submit to the extinguishment of their other property right. But that fact, if it be a fact, is wholly irrelevant. By art. 10 of the Declaration of Rights, the right is guaranteed to "Each individual of the society . . . to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws." In the continued enjoyment of these three rights when defined and established by law the individual is not obliged to submit to the judgment of court or Legislature that he ought to hand them over for compensation to some one or more of his fellows in their private interest. He is secure under the Constitution in his right to keep what is his own, even though another wants it for private uses and may be willing to pay more than its value.

The Legislature has broad powers as to the regulation of the rights of owners of property in common. It is on this ground that mill acts, cranberry acts, acts in regard to proprietors of wharves, general fields and lands lying in common and division of lands held by tenants in common, are upheld. *Lowell* v. *Boston*, 111 Mass. 454, 466, 468. *Turner* v. *Nye*, 154 Mass. 579, 582. *Wurts* v. *Hoagland*, 114 U. S. 606. It "often has been said with regard to the mill acts, that under them no easement or title of any kind is gained in or over the upper land, and that the water could be diked out, *Storm* v. *Manchaug Co.* 13 Allen, 10, 13; *Lowell* v. *Boston*, 111 Mass. 454, 466; although the language has not been uniform and it seems to have been held otherwise when the damages are paid

in gross. *Isele* v. *Arlington Five Cents Savings Bank*, 135 Mass. 142." Mr. Justice Holmes, in *Otis Co.* v. *Ludlow Manuf. Co.* 201 U. S. 140, 153. That statement may be equally applicable to the other instances of property owned in common. But manifestly that statement of the legal effect and constitutional bound of such statutes cannot be stretched to include a case like the present where a right in the nature of an easement in real estate is extinguished for the benefit of the servient estate upon the payment of money. Suits to quiet title also are within the power of the Legislature. *Crocker* v. *Cotting*, 173 Mass. 68. *Loring* v. *Hildreth*, 170 Mass. 328. The present statute is not of that character. The rights of the parties are declared plainly by written instruments.

The case at bar is the converse of *Hellen* v. *Medford*, 188 Mass. 42, where it was held that a landowner once deprived of his land by eminent domain and hence entitled to compensation in money could not subsequently be compelled to accept a return of his land through abandonment in reduction of those damages.

As applied to the facts here disclosed, the statute deprives some of the respondents of their rights in real property for a private use contrary to the security afforded by arts. 1 and 10 of the Declaration of Rights. The decision of the Land Court was erroneous in this respect. It is needless to consider the other objections raised by the respondents, or the constitutionality of the statute in other aspects. The decision of the Land Court is reversed on this ground.

So ordered.

MAYOR OF CAMBRIDGE *vs.* CITY OF CAMBRIDGE.

Middlesex. September 18, 1917. — October 16, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

Municipal Corporations. Cambridge. Interest.

Under the provision contained in St. 1915, c. 267, Part III, § 7, that in all cities adopting the Plan B form of government, the new city council shall determine the salary to be received by the new mayor, not exceeding $5,000, and that "His salary shall not be increased or diminished during the term for which he

is elected," and under the provision of St. 1915, c. 267, Part I, § 4, that "All ordinances . . . of a city . . . , existing at the time when such city adopts a plan of government set forth in this act, shall continue in full force and effect until annulled, repealed, modified or superseded," an ordinance of the city of Cambridge, which was in force when that city adopted the Plan B form of government, fixing the salary of the mayor under the former charter at $3,500 a year, is in conflict with the power given to the city council by the new charter and does not impair the validity of an ordinance, passed by such city council four months after the adoption of the new charter, fixing the salary of the mayor under that charter at $5,000 a year.

The city of Cambridge adopted the Plan B form of government in November, 1915. The ordinance of the city council of Cambridge under the new charter, referred to above, was passed on March 21, 1916, and provided that the mayor's salary of $5,000 a year should begin on the first Monday in January, 1916. On March 25 the mayor made demands on the auditor for his salary for the months of January and February at the rate of $5,000 a year, and thereafter on the first day of each month presented to the auditor a claim for his monthly salary at the rate of $5,000 a year. All these demands were refused by the auditor. An ordinance of the city provided that pay-day for services performed for the city should be the tenth day of the month succeeding the month in which the services were rendered. *Held*, that the mayor was entitled to interest on three months' salary from April 10, 1916, and to interest on the salary for each of the other months from the tenth day of the month next succeeding the month for which the salary became due.

CONTRACT by Wendell D. Rockwood, who on December 21, 1915, was elected mayor of Cambridge for a term of two years from the first Monday of January, 1916, for $5,000, alleged to be the amount of his salary from January 3, 1916, to January 1, 1917.

In the Superior Court the case was submitted to *Fox*, J., upon an agreed statement of facts, of which the substance is stated in the opinion. The judge found the facts to be as stated in the agreed statement of facts and reported the case for determination by this court, such judgment to be entered as should be in accord with such determination.

St. 1915, c. 267, Part III, § 7, so far as material, is as follows: "The mayor shall receive for his services such salary as the city council by ordinance shall determine, not exceeding five thousand dollars a year, and he shall receive no other compensation from the city. His salary shall not be increased or diminished during the term for which he is elected."

St. 1915, c. 267, Part 1, § 4, is as follows: "All ordinances, resolutions, orders or other regulations of a city or of any authorized body or official thereof, existing at the time when such city adopts a plan of government set forth in this act, shall continue

in full force and effect until annuled, repealed, modified or superseded."

4. *T. Smith*, for the defendant.

F. T. Hammond, for the plaintiff.

LORING, J. In November, 1915, the defendant city adopted the second of the four charters which the several cities of the Commonwealth (outside of Boston) by force of St. 1915, c. 267, were given permission to adopt, called in the statute Plan B. In December, 1915, the plaintiff was elected and on the first Monday of January, 1916, he qualified as mayor under the new charter. Acting under § 7 of the new charter (St. 1915, c. 267, Part III) the new city council on March 21, 1916, adopted an ordinance determining that the salary of the mayor should be $5,000 a year and that it should begin on the first Monday of January, 1916. On the defendant refusing to pay the salary so established this action was brought by the plaintiff to recover the salary then due him for his first year of service.

The defence set up is that the ordinance of March 21, 1916, is void. This contention is based on the fact that an ordinance was adopted by the old city council in 1892 establishing the salary of the incumbent of the former office of mayor at $3,500 and upon the further fact that it is provided by St. 1915, c. 267, Part I, § 4, that: "All ordinances . . . existing at the time when such city adopts a plan of government set forth in this act, shall continue in full force and effect until annulled, repealed, modified or superseded." The contention of the defendant is that by force of St. 1915, c. 267, Part I, § 4, the new mayor's salary was established at $3,500 when the plaintiff came into office and that the clause of Part III, § 7, which provides that the mayor's "salary shall not be increased or diminished during the term for which he is elected" prevented the new city council from increasing the amount of the salary so established.

The contention cannot be upheld. When in November, 1915, the defendant city adopted the second of the four plans of government set forth in St. 1915, c. 267, Part III, a new system of government came into effect, *Cunningham* v. *Mayor of Cambridge*, 222 Mass. 574, 577, and the office of mayor under the new system of government (which came into effect then), though called by the same name, was a new office. *Donaghy* v. *Macy*, 167 Mass. 178.

In that new office the old city council had a passing interest at the most. It was the intention of the Legislature in enacting Part III, § 7, to provide that the salary for services to be performed by the incumbent of the new office should be determined by the new city council and that the salary so established should not be increased nor diminished during the term for which the incumbent had been elected. It is plain that in enacting Part I, § 4, it was not the intention of the Legislature to modify in any way the authority given to the new city council by Part III, § 7. The purpose of Part I, § 4, was to bridge over the interim between the repeal of an old charter (by the adoption of one of the four charters set forth in St. 1915, c. 267), and such time as action was taken under the new charter with respect to those matters of city government which are ordinarily provided for by ordinances, resolutions and orders. When St. 1915, c. 267, was enacted the salary to be received by the mayor was established in case of some cities by a provision in the charters of those cities, while it was provided in the charters of the other cities that the mayor's salary should be established by an ordinance adopted pursuant to the charter. It could not have been the intention of the Legislature in enacting Part I, § 4, to modify § 7 of Part III so that it should mean one thing in case of some of the cities and another thing in case of the other cities. Section 7 means that in case of all cities adopting Plan B the new city council shall determine the salary to be received by the new mayor for services rendered by him including the services rendered by him during his first two years of office. The effect of Part I, § 4, rightly construed, is to continue in force "All ordinances, resolutions, orders or other regulations . . . existing at the time when such city adopts a plan of government set forth in this act," so far as those ordinances, resolutions, etc. are not in conflict with specific provisions of the new charter, whether it is Plan A, B, C or D. The old ordinance of 1892 fixing the salary of the incumbent of the former office of mayor of the defendant city at $3,500 is in conflict with the power given to the city council elected under the new charter to establish the salary (not exceeding $5,000) to be received by the incumbent of the new office of mayor for services to be rendered in that office. It follows that the ordinance relied on by the defendant did not control the right given

to the city council elected under the new charter to establish the salary to be paid to the plaintiff for the year here in question.

The plaintiff claims interest on the amount due him, and no contention to the contrary has been made by the defendant. It appears that on March 25 the plaintiff made demands on the auditor for his salary (at the rate of $5,000 a year) for the months of January and February and the auditor declined to approve a bill and sign a draft for the payment of the sum demanded. It further appears that thereafter the mayor duly presented to the auditor a claim for his monthly salary at the rate of $5,000 a year on the first of each month and that the auditor declined in each instance to approve a bill and sign a draft for the sum then due. It is provided by one of the ordinances of the city continued in force by Part I, § 4, that pay-day for services performed for the defendant city shall be on the tenth day of the month succeeding the month in which the services were rendered. The plaintiff asks to be allowed interest on three months' salary from April 10, 1916, and interest on the other nine months' salary from the tenth day of each month next succeeding the month for which the salary became due. We are of opinion that he is entitled to the interest asked for.

Judgment accordingly.

JOSE LUIZ *vs.* THOMAS FALVEY.

Hampden. September 24, 1917. — October 18, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

Evidence, Competency, Remoteness. *Motor Vehicle. Practice, Civil*, Exceptions, Discretionary power of presiding judge. *Witness*, Questions to show character.

The fact that a party to an action did or did not do a certain act cannot be proved by evidence that at other times it had been his custom to do or not to do this act.

In an action for personal injuries caused by the collision of a bicycle which the plaintiff was riding with a motor truck operated by the defendant, the plaintiff testified that he was on the right hand side of the road and that the defendant swerved with his motor truck to the left in order to turn a corner to the right and thus ran into him, while the defendant testified that he was driving on the

right hand side of the road, not intending to turn the corner, and that the plaintiff's bicycle was wobbling from one side of the road to the other and ran into the truck. A witness for the plaintiff was allowed, without objection from the defendant, to testify that he had seen the defendant's truck go up this same road at other times. On cross-examination the defendant, subject to the plaintiff's exception, was allowed to ask the witness "What kind of a turn" the defendant's truck "customarily" made in going round the corner in question, and the witness answered that the truck turned close to the corner when he had seen it. The defendant contended, that, the plaintiff having asked the witness on his direct examination as to the defendant's truck having been driven up this road at other times, the presiding judge in his discretion might allow the defendant to introduce further evidence on this immaterial issue, but it was *held* that the question in regard to the manner of turning the corner was not opened by the plaintiff, so that the rule as to the discretionary power to allow an immaterial issue to be met after being opened did not apply.

In the same case it was *held* that the plaintiff was harmed by the admission of the incompetent evidence in regard to the defendant's customary way of turning the corner, because, if the jury had believed the plaintiff's testimony that the defendant swerved to the left, they could find that the defendant was violating St. 1910, c. 605, § 5, which requires that a motor vehicle "approaching a crossing of ways" shall "keep to the right of the intersection of the centres of both ways, when turning to the right."

In the same case it appeared that two of the plaintiff's own witnesses had testified that after the accident the defendant's truck was on the right hand side of the road about fifty feet before reaching the corner in question, and the defendant contended that in the light of this evidence the admission of the incompetent evidence as to the defendant's customary way of turning the corner could not have harmed the plaintiff, but it was *held* that this testimony of the plaintiff's two witnesses was in conflict with the testimony of the plaintiff himself and that the jury were at liberty to believe the plaintiff.

At the trial of an action of tort for personal injuries, where the plaintiff and the defendant both have testified as witnesses, it is within the discretionary power of the presiding judge to allow the plaintiff and the defendant each to be asked how many children and how much of a family he has in order to enable the jury to learn in a general way "what sort of a man is on the witness stand."

TORT for personal injuries sustained on June 5, 1915, when the plaintiff was riding a bicycle on the road from South Hadley Centre to South Hadley Falls in the town of South Hadley and was struck by a motor truck driven by the defendant. Writ dated August 12, 1915.

In the Superior Court the case was tried before *Aiken*, C. J. The material evidence is described in the opinion. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions relating to the admission of evidence as stated in the opinion.

The case was submitted on briefs.

R. P. Stapleton, F. J. McKay & E. J. Stapleton, for the plaintiff.
W. G. McKechnie, for the defendant.

LORING, J. The plaintiff's story in this case was that while riding south on his bicycle on Hadley Road he was run into by a motor truck owned and operated by the defendant going north on the same road. He testified that, when he reached a point about seventy feet south of Granby Road (which leads out of the Hadley Road on the east) and while he was riding on the right hand side of the road, the defendant swerved out to his left in order to make the turn into Granby Road and ran into him. The defendant's story was that he was going up Hadley Road on the right not intending to go into Granby Road; that the plaintiff came down the road wobbling from one side to the other side of the road with one hand on the handle-bar, his head turned back to speak to a companion, and ran into the truck. A witness called by the plaintiff was allowed without objection on the part of the defendant to testify that he had seen the defendant's truck go up Granby Road at other times. On cross-examination the defendant under the plaintiff's exception was allowed to ask the witness, "What kind of a turn did it [the defendant's truck] customarily make from South Hadley up to the Granby road?" and he testified that it turned close to the corner when he had seen it. The witness testified through an interpreter, and some intermediate questions were asked in this connection by the presiding judge seemingly to secure an answer to the question asked. No contention has been made by the defendant based upon this intervention on the part of the judge.

The evidence was incompetent. The fact that a party did or did not do an act in issue at a trial cannot be proved by evidence that it had been his custom to do or not to do that act at other times. See, for example, *Robinson* v. *Fitchburg & Worcester Railroad,* 7 Gray, 92; *Tenney* v. *Tuttle,* 1 Allen, 185; *Gahagan* v. *Boston & Lowell Railroad,* 1 Allen, 187; *Lizotte* v. *New York Central & Hudson River Railroad,* 196 Mass. 519.

To escape from this difficulty the defendant has contended that this line of inquiry had been opened to him by the plaintiff asking as to the fact of the defendant's truck having been driven up Granby Road at other times, that both inquiries were immaterial and that for these reasons the case comes within the rule that the

presiding judge in his discretion may allow a party to a cause to go into evidence upon an immaterial issue opened by the other party to the cause. But the evidence which the defendant was allowed to introduce was not confined to the fact upon which the plaintiff introduced evidence, namely, the fact that the defendant's truck had been seen going into Granby Road before the accident here in question. It was an inquiry going beyond the fact gone into by the plaintiff.

The next contention made by the defendant is that from the nature of it the plaintiff was not harmed by the evidence. But that is not so. The truth of the plaintiff's story that the defendant swerved over to the wrong side of Hadley Road was of vital importance on the issue on trial. If the jury believed it to be the fact, that when the defendant's truck had turned into Granby Road in the past it had "customarily" made the turn "close to the corner," the plaintiff was harmed by the introduction of that incompetent evidence. And this is emphasized by the fact that, in case the defendant was making the turn into Granby Road, as the plaintiff testified, he was driving in violation of St. 1910, c. 605, § 5, which provides that: "The driver of any motor vehicle on any highway approaching a crossing of ways, shall slow down and keep to the right of the intersection of the centres of both ways, when turning to the right."

The defendant's last contention is that the plaintiff was not harmed by the evidence because two of the plaintiff's own witnesses testified that after the accident the defendant's truck was some fifty feet below Granby Road corner and was on the right side of the road. Without considering this evidence and the inferences necessarily drawn from it, the contention is disposed of by the fact that this evidence was in conflict with the plaintiff's testimony and the jury were at liberty to believe the plaintiff. This exception must be sustained.

There is one question of practice raised at the trial which may come up again and therefore ought to be disposed of. On cross-examination of the plaintiff, the defendant under the plaintiff's exception was allowed to ask him how many children he had, and he testified that he had six, all of them in Portugal, and that he did not bring them with him when he came to this country because he did not have the passage money. In direct examination the

defendant's counsel was allowed under the plaintiff's exception to ask the defendant how much of a family he had, and he testified that he had a wife and five children. The presiding judge told the jury that this evidence as to the families of the plaintiff and the defendant was admissible in order to enable the jury to get in a general way "what sort of a man is on the witness stand," that it was competent for that purpose and that purpose only. He told them in terms that "Luiz in this case does n't get any more or any less compensation because he has a wife and children in Portugal. His right to damages is not affected by that feature of the case" and that "Falvey's responsibility, if he is responsible in your judgment, is no way affected, one cent either way, by the fact that he has a family of children." As matter of practice it is usual to allow parties to ask such questions. As matter of law it is within the discretion of the judge to allow such testimony.

Exceptions sustained.

CARL DAVIDSON'S CASE.

Suffolk. October 16, 1917. — October 18, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Workmen's Compensation Act, Medical and hospital services. *Physicians and Surgeons.*

Where a manufacturer, who was a subscriber under the workmen's compensation act, had posted notices in his factory giving the name and location of a hospital where "medical and hospital attendance" would be furnished for injured employees, and an injured employee, when urged to go to the designated hospital, replied that he "did not want to bother," and afterwards was attended by a physician of his own choosing, under St. 1911, c. 751, Part II, § 5, as amended by St. 1914, c. 708, § 1, the insurer is not liable to the physician for any part of his services.

APPEAL to the Superior Court from a decision of the Industrial Accident Board upon an intervening petition under St. 1911, c. 751, Part III, § 13, of Francis R. Mahoney, asking for the approval by the Industrial Accident Board of the payment of his fee for services as a physician rendered to Carl Davidson, an injured

employee and a claimant for compensation under the workmen's compensation act, during the first two weeks after his injury.

The decision appealed from was as follows: "The Industrial Accident Board find and decide upon all the evidence that the employer complied with its obligation to furnish reasonable medical and hospital services by offering such services at the Lowell General Hospital; and that the insurer is not under any liability to pay the bill of the physician selected by the employee. Therefore, the claim of the physician for services rendered the employee is dismissed."

The case was heard by *Lawton*, J. The material facts are stated in the opinion. The judge made a decree affirming the decision of the Industrial Accident Board and declaring "that the insurer is not under any liability to pay the bill of the physician selected by the employee." The intervening petitioner appealed.

St. 1911, c. 751, Part II, § 5, as amended by St. 1914, c. 708, § 1, is as follows: "During the first two weeks after the injury, and, if the employee is not immediately incapacitated thereby from earning full wages, then from the time of such incapacity, and in unusual cases, in the discretion of the board, for a longer period, the association shall furnish reasonable medical and hospital services, and medicines, when they are needed. Where, in a case of emergency or for other justifiable cause, a physician other than the one provided by the association is called in to treat the injured employee, the reasonable cost of his services shall be paid by the association, subject to the approval of the Industrial Accident Board. Such approval shall be granted only if the board finds that there was such justifiable cause and that the charge for the services is reasonable."

T. H. Mahony, for the intervening petitioner, submitted a brief.

G. Gleason, for the insurer.

By the Court. This is a claim under the workmen's compensation act for compensation for services rendered by a physician in treating an employee for injuries received by him arising out of and in the course of his employment. The facts disclosed by the record are that arrangements had been made with a hospital to furnish to employees of the insured, injured in the course of their work, necessary medical and surgical treatment, and that notices to this effect were posted conspicuously in different places

in the manufactory of the insured employer. The employee in the case at bar immediately upon being injured was urged to go to the designated hospital. He replied that he "did not want to bother," but finally consulted a physician of his own selection not connected with the hospital. That physician contended before the single member of the Industrial Accident Board who heard the evidence that the notices posted were insufficient in not stating that the injured employee "must" go to the hospital. That contention is not sound. A notice of that tenor would not be true. The statute imposes an obligation upon the insurer to furnish reasonable medical attendance. It does not make it imperative upon the employee to accept such attendance. He is at liberty under the act, if he prefers to do so, to secure at his own expense medical attendance of his own selection.

The notices posted in the manufactory of the employer were amply sufficient. They gave the name and location of the hospital where both "medical and hospital attendance" were furnished for injured employees. The decision of the Industrial Accident Board to the effect that the insurer was not liable to the physician selected by the employee was plainly right. The insurer had done all that the act required of it in providing reasonable medical attendance. *Panasuk's Case*, 217 Mass. 589. *Pecott's Case*, 223 Mass. 546.

Decree affirmed.

CATHERINE M. FERRY *vs.* EASTERN CONSOLIDATED AMUSEMENT COMPANY.

Hampshire. October 16, 1917. — October 19, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, Contributory. *Evidence*, Competency. *Practice, Civil*, Exceptions.

In an action for personal injuries sustained in a place of amusement maintained by the defendant called "The Giggler," consisting of passageways full of surprises produced by mechanical contrivances, where it appeared that the plaintiff was hurt by slipping on a long strip of sheet metal over which she was walking, having hold of an iron hand rail sufficiently to guide her steps, the plaintiff testified that there was a reason why she did not take a firm hold of the rail,

and then was allowed, subject to the defendant's exception, to state that she "felt a little afraid of it," that she "did not really know what to expect," and that she "was afraid of shocks, . . . an electric shock." The plaintiff also testified that she held tighter on the rail as she felt herself falling and had hold of it all the time. *Held*, that, under the conditions shown, the evidence was competent as bearing upon the plaintiff's due care, and that, moreover, its admission could not have harmed the defendant, as it did not appear that the plaintiff's injury resulted in any degree from the nature of her grasp upon the support.

TORT for personal injuries sustained by the plaintiff on July 31, 1916, in a place of amusement known as "The Giggler" maintained by the defendant at Riverside Park, so called, in the town of Agawam, the manner of the injury being described in the opinion. Writ dated November 28, 1916.

In the Superior Court the case was tried before *Hamilton*, J. The jury returned a verdict for the plaintiff in the sum of $2,183.33; and the defendant alleged exceptions, relating to the admission in evidence of certain testimony of the plaintiff as explained in the opinion.

The case was submitted on briefs.

J. F. Carmody, for the defendant.

R. P. Stapleton & E. J. Stapleton, for the plaintiff.

BY THE COURT. This is an action of tort to recover damages for personal injuries received by the plaintiff in a place of amusement called "The Giggler." It was made up of passageways in which were various devices, some moved by mechanical contrivances and others by the passage of people over them. There was evidence tending to show that the plaintiff was hurt by slipping upon a piece of sheet metal about twenty-one feet long over which she was walking. It was described as designed to have the "effect of an ordinary suspension bridge, swinging up and down; it would give under your weight." It was part of a combination of artifices or mechanisms through which people were invited to walk by a "big grotesque looking face outside" and a sign "It won't hurt you to laugh." There was an iron hand rail of which, as the plaintiff walked across the metal, she took sufficient hold to guide her steps. After testifying without objection that there was a reason why she did not take a firmer hold, she was permitted, subject to the defendant's exception, to state that the reason was that she "felt a little afraid of it," that she "did not really know what to expect," that she "was

afraid of shocks, . . . an electric shock." The plaintiff also testified that she held tighter on the rail as she felt herself falling and had hold of it all the time.

No reversible error is disclosed. Under these conditions the evidence was competent as bearing upon her due care. *Carriere* v. *Merrick Lumber Co.* 203 Mass. 322, 327. A light hold upon a metallic hand rail in a place where constant surprises were to be anticipated might have been thought to be prudent. Moreover it does not appear that her injury resulted in any degree from the nature of her grasp upon the support.

Exceptions overruled.

HENRY ROSE *vs.* JOHN HARRISON.

Suffolk. October 18, 1917. — October 19, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Practice, Civil, Appeal.

A record, which discloses only an appeal from an order denying, after a hearing, a petition to vacate a judgment, is barren of any suggestion of a question of law, and the appeal is frivolous.

PETITION, filed in the Municipal Court of the City of Boston on October 10, 1916, to vacate a judgment of that court.

The record contained a copy of the petition and of the jurat thereon, and a copy of an order of notice upon the petition issued by the Municipal Court of the City of Boston on October 13, 1916. The rest of the record was as follows:

"Petition filed in Municipal Court Oct. 10, 1916.

"Entered in Superior Court Dec. 7, 1916.

"Petition denied after hearing Feb. 9, 1917.

"Plaintiff's Appeal.

"And now the plaintiff appeals from the order or decree of this honorable court, denying his petition herein, to the Supreme Judicial Court.

By his Attorney,

F. Galloupe Woodbury.

"Filed Feb. 10, 1917."

F. G. Woodbury, for the petitioner, appeared in court, but filed no brief.

G. J. Weller, for the respondent, submitted a brief.

BY THE COURT. This record consists of a "petition to vacate judgment," the order of notice thereon, the date of filing in the Municipal Court, the date of entry in the Superior Court, a statement that the petition was "denied after hearing," and the plaintiff's appeal. The record is barren of any suggestion of a question of law. Therefore there is nothing to be considered. *Cobb* v. *Hale*, 172 Mass. 387.

The appeal is frivolous. The denial of the petition is affirmed with double costs under the statute.

So ordered.

FREDERICK W. MANSFIELD *vs.* SECRETARY OF THE COMMONWEALTH.

Suffolk. October 18, 1917. — October 19, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Mandamus. Elections, Official ballot.

Upon a petition for a writ of mandamus, which is a proceeding at law, this court has no jurisdiction to change or reverse a decision as to the facts made by the single justice who heard the case unless the finding of fact is not warranted by the evidence.

Upon a petition for a writ of mandamus a finding of a single justice, warranted by the evidence presented before him, that the surname of a candidate for Governor always has been spelled "McCall" and never has been spelled "MacCall," that the name of the candidate is "McCall" and not "MacCall" and that under St. 1913, c. 835, § 259, "the name of Frederick W. Mansfield should precede that of Samuel W. McCall in the arrangement of names in alphabetical order upon the official ballot of candidates for Governor," is a finding of fact which is not open to revision by this court.

PETITION, filed on October 16, 1917, for a writ of mandamus addressed to the Secretary of the Commonwealth commanding him, in the preparation of the official ballot for the election of Governor under St. 1913, c. 835, § 259, which provides that the names on the official ballot for election to office shall be arranged in alphabetical order according to the surnames, to print the

name of the petitioner, Frederick W. Mansfield, before the name of Samuel W. McCall, an opposing candidate for the office of Governor.

The answer of the respondent, as filed by the Attorney General, contained, among other allegations, the averment "that the name 'McCall' is an abbreviation of the name 'MacCall,' and that according to accepted usage and custom pertaining at the time of the adoption of the statute requiring names on official ballots to be arranged in alphabetical order according to surnames and at the present time, names such as 'McCall' are arranged with names spelled 'MacCall' and similar names, and precede in alphabetical arrangement the name 'Mansfield.'"

The case was heard by *Crosby*, J., who made certain findings of fact, including those that are stated in the opinion and concluding as follows: "I further find that the surname of Samuel W. McCall has so far as the evidence shows always been spelled 'McCall' and never has been spelled 'MacCall' and that the surname of Frederick W. Mansfield, so far as the evidence shows, has always been spelled 'Mansfield.' I further find that Mr. McCall's name is 'McCall' and not 'MacCall.' Upon these facts so far as it is a question of fact I find that the name of Frederick W. Mansfield should precede that of Samuel W. McCall in the arrangement of names in alphabetical order upon the official ballot of candidates for Governor."

The single justice reported the case, reserving all questions of law arising upon the record for determination by the full court, such disposition to be made of the case as the full court should direct.

F. W. Mansfield, pro se.

H. W. Barnum, Assistant Attorney General, for the respondent.

RUGG, C. J. This is a petition for a writ of mandamus to compel the secretary of the Commonwealth to place the name of the petitioner as candidate for Governor before that of Samuel W. McCall upon the official ballot for the impending state election.

It is the duty of the respondent to arrange the names of the several candidates for Governor upon the ballot "in alphabetical order according to the surnames." St. 1913, c. 835, Part III, § 259. There has been a hearing before a single justice who has made a finding of facts. His conclusion, after a narration of various

matters of probative value on the issue, is in these words: "Upon these facts, so far as it is a question of fact, I find that the name of Frederick W. Mansfield should precede that of Samuel W. McCall in the arrangement of names in alphabetical order upon the official ballot of candidates for Governor. I reserve all questions of law arising upon the record for the determination of the full court, such disposition of the case to be made as that court shall direct."

A petition for a writ of mandamus is a proceeding at law. This court has no jurisdiction in a proceeding at law to change or reverse a decision as to the facts made by the tribunal charged with the duty of ascertaining the facts. The weight of evidence in such proceeding is not open to revision by this court. *Electric Welding Co. Ltd.* v. *Prince*, 200 Mass. 386, 391. *Commonwealth* v. *National Contracting Co.* 201 Mass. 248. The rule in equity is different.

The alphabetical precedence of surnames under the circumstances here disclosed is a question of fact and not of law. The precise point is whether in arranging the names in alphabetical order McCall should be treated as equivalent to the combination of letters MacCall and as if so spelled. How it is spelled in truth and whether the real name is "MacCall" or "McCall" and whether the latter form is an abbreviation of the former are questions of fact. We know of no rule of law by which to settle those questions.

The only question of law open on this record is whether the decision of the single justice, to the effect that the surname "Mansfield" precedes the surname "McCall" in alphabetical order and that the latter is not to be treated as the equivalent of "MacCall," finds any justification in the evidence. That finding cannot be pronounced erroneous as matter of law if there is any evidence of substance to support it. It is only when such finding is unwarranted by the evidence that it can be set aside. *Wade* v. *Smith*, 213 Mass. 34. *Bailey* v. *Marden*, 193 Mass. 277.

The subsidiary facts found by the single justice are in effect that there is a general custom in the United States and England in arranging and indexing surnames in books and catalogues to place names beginning with "Mc" before those beginning with "Man;" and that this custom is nearly if not quite universally

observed by librarians and prevails generally in the arrangement of names in directories and in a large number of other publications including dictionaries, encyclopaedias and digests. The letters "Mc" or "Mac" and also "M' " as part of a surname are derived from the Gaelic and mean "son of."

But he also finds that there are a number of other publications and lists, in which names beginning with "Man" precede those beginning with "Mc." These include the Boston telephone and other directories, certain acts and resolves, and the voting list of the town of Winchester, where Mr. McCall resides. He finds further that the surname of the candidate has in fact always been spelled "McCall" and has never been spelled "MacCall." There was evidence tending to support all these findings. That hardly can be disputed upon this record. Its weight is not for us to consider. Although it reasonably might have been inferred that the name "McCall" is an abbreviated form of the full name "MacCall" and therefore ought to be so treated in alphabetical arrangement, and that such arrangement was customary and hence proper, this cannot be said to be the only rational inference of which the subsidiary facts and the evidence are susceptible. It cannot be declared as matter of law that the ultimate finding to the effect that the name "Mansfield" precedes the name "McCall" in alphabetical order is erroneous. It is not wholly unsupported by evidence.

It follows as a necessary consequence of the finding of fact made by the single justice that the writ ought to issue commanding the respondent to arrange the names of candidates in accordance therewith by placing that of Mansfield before that of McCall.

So ordered.

COMMONWEALTH *vs.* CARRIE LAPOINTE.

Hampden. September 25, 1917. — October 20, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Permitting Building to be used for Prostitution. Constitutional Law. Evidence, In corroboration, Circumstantial.

At the trial of a complaint under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, for permitting a building under the defendant's control to be used for prostitution, assignation and lewdness, where the complaint contains only one count and charges no other offence, it is error for the presiding judge to instruct the jury that, if the defendant let the building knowing at the time she let it that the tenant was to use the premises for the purposes prohibited by the statute, they could find the defendant guilty, because letting a building for the purposes of prostitution, assignation and lewdness is a separate and different crime defined in the same section of the statute, and under art. 12 of the Declaration of Rights no defendant can "be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him."

At the trial of a complaint under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, for permitting a building under the defendant's control to be used for prostitution, assignation and lewdness, where evidence has been introduced tending to show the control of the defendant over the house in question, two internal revenue receipts for taxes paid for the sale of intoxicating liquors issued to the defendant and found enclosed in envelopes in a desk in the house in question properly may be admitted in evidence as tending to corroborate the evidence in regard to the defendant's control over the house.

COMPLAINT, signed and sworn to on April 25, 1917, under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, charging that the defendant at Holyoke "during the three months next preceding the making of this complaint, while having under her control a certain building situated [as described] did knowingly permit said building to be used for the purposes of prostitution, assignation and lewdness."

In the Superior Court the defendant was tried before *Hamilton*, J. A motion to quash the complaint was denied by the judge. The defendant excepted to the admission in evidence of two internal revenue tax receipts as described in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. If the jury find that Lena Neilson had control of the property in question the defendant can not be convicted.

"2. In order to find the defendant guilty the jury must find that she was in control of the property in question.

"3. If the jury find that Lena Neilson rented the property in question from the defendant the defendant can not be found guilty."

The judge refused to make these rulings except so far as they were incorporated in his charge. He gave to the jury, among other instructions, the instruction which is quoted in the opinion and to which the defendant excepted. The judge returned a verdict of guilty; and the defendant alleged exceptions.

J. O'Shea, for the defendant.

J. B. Ely, District Attorney, for the Commonwealth.

RUGG, C. J. Three different acts are made punishable by R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14. If a person who (1) owns or has control of a building or tenement knowingly lets it for purposes of prostitution, assignation or lewdness, or (2) knowingly permits a building or tenement or any part thereof while under his control to be used for such purposes, or (3) after due notice of such use omits to take all reasonable measures to eject therefrom the persons occupying the same as soon as it lawfully can be done, he shall be punished. The acts thus specified are separate and distinct, each from the others. One does not include either of the others.

The complaint in the case at bar charged that the defendant, "while having under her control a certain building . . . did knowingly permit said building to be used for the purposes" prohibited. It is in a single count and charges no other offence.

Manifestly the only crime charged is the second one set out in the statute. There was evidence tending to prove the offence charged. But there was also other evidence having some tendency to show that the defendant, although the owner of the building in question, had rented it to one Neilson, who was in control of it during the time named in the complaint. Upon this state of evidence the jury were instructed, "if you find that she [the defendant] did rent the premises to Lena Neilson, and at the time she rented the premises to Lena Neilson she knew that Lena

Neilson was to use the premises for the purposes prohibited by the statute, then you would have a right to find the defendant guilty."

This instruction was erroneous. It permitted the jury to adjudge the defendant guilty of the first crime described in the statute. The complaint did not charge the commission of that crime, but of another and different crime, namely, the second one described in the statute. The charge to the jury in effect told them that they might report a verdict of guilty provided the evidence satisfied them that she had committed an offence of a character different from that set forth in the complaint. It requires no discussion to demonstrate that this was harmful error. It is a constitutional guaranty that "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him." Art. 12 of the Declaration of Rights.

The argument that, because the premises might have been found to have been let with knowledge that they were to be used for an illegal purpose and hence that the lease in some aspects was void, the defendant was in control as owner, is of no avail to the Commonwealth, for the reason that such letting is the precise crime set forth in the first clause of the instant statute, and therefore it cannot be thought that the Legislature intended the rule as to void leases to be applicable in this connection. *Commonwealth* v. *Wentworth*, 146 Mass. 36.

Two internal revenue tax receipts for the sale of intoxicating liquors issued to Carrie LaPointe enclosed in envelopes were found in a desk in the house in question. They were admitted in evidence subject to the defendant's exception solely as tending to show the connection between the house and the defendant. There was other evidence of control over the house by the defendant. There was no reversible error in this ruling under all the circumstances. The mere issuing of a license in the name of a certain person, without direct or inferential evidence that knowledge of it has been brought home to him, is no evidence against the person named in it. *Jordan* v. *Carberry*, 185 Mass. 181. But documents bearing the name of the owner, when found within a house in connection with other evidential factors, cannot be said to have no legitimate corroborative value tending to show con-

trol over that house. See *Commonwealth* v. *Uhrig*, 146 Mass. 132.

The motion to quash has not been argued and is treated as waived.

Exceptions sustained.

COMMONWEALTH *vs.* THOMAS P. COYNE & another.

Worcester. October 1, 1917. — October 20, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Practice, Criminal, Conduct of trial: order of evidence. *Evidence,* In corroboration, Circumstantial.

In a criminal trial, as in a civil one, the order of evidence is within the discretionary power of the presiding judge, who in the exercise of such discretion, after the defendant has introduced some evidence, may permit the district attorney to reopen his case and introduce further evidence in support of the indictment.

At the trial of two defendants upon a joint indictment for breaking and entering a dwelling house in the night time with the intent to commit larceny therein and for the larceny therein of divers articles of jewelry and precious stones of an aggregate value of about $5,000, where evidence has been introduced tending to show that the defendants committed the crime charged, the district attorney may be allowed to show further that neither of the defendants had worked for a year before their arrest and that neither of them had any visible means of support, and that, when arrested about two months after the burglary, one of them had in his possession $350 in money and diamonds and other jewelry of about $1,600 in value and the other had in his possession about $117 in money and diamonds and other jewelry of about $600 in value, although none of the articles found in the possession of either of them is identified as the property stolen or is shown to have come from the house that the defendants are charged with breaking and entering, the jury being instructed to disregard this evidence upon the question of breaking and entering and to consider it only if the breaking and entering should be found to be proved by independent evidence and, even then, only if it should be found that the defendants "had no other source of income to account for the possession of the property found in their possession."

INDICTMENT found and returned in the county of Worcester on the third Monday of January, 1917, charging that the defendants, Coyne and Farrell, on August 28, 1916, did break and enter in the night time the dwelling house of George R. Wallace in Fitchburg with intent to commit larceny therein and therein did steal

various enumerated articles of jewelry, the property of Helen M. Wallace.

The defendants were tried before *Sanderson*, J. The jury returned a verdict of guilty against each of the defendants, and the defendants alleged exceptions to the admission of certain evidence, which, with the manner of its introduction, is described fully in the opinion.

J. M. Hoy, for the defendants.

E. T. Esty, District Attorney, for the Commonwealth.

RUGG, C. J. The defendants were indicted jointly for breaking and entering the dwelling house of one Wallace in the night time with the intent to commit larceny, and for the larceny therein of divers articles of jewelry and precious stones of an aggregate value of about $5,000. There was evidence tending to show that the defendants committed the crime.

After the defendants had introduced some evidence the presiding judge, at the request of the district attorney, permitted him to reopen the case and introduce further evidence in support of the charge in the indictment. The conduct of the trial and the order of the introduction of evidence ordinarily is within the discretion of the trial judge. There is nothing to indicate an abuse of such discretion.

The evidence thus introduced out of order was to the effect that when arrested the defendant Coyne had in his possession $350 in money; "one New York, New Haven & Hartford Railroad Company five hundred mile ticket, containing one hundred and fifty-six miles, stamped 'Bridgeport, Conn., Oct. 20, 1916;' one platinum ring set with three diamonds, stated by the defendant to be worth $1,000, but he declined to tell where he got it; one diamond stick pin set in platinum, stated by the defendant to be worth $500; one gold handled knife attached to a fourteen inch gold and platinum link chain, stated by him to be worth together $45; one gold stud button set with a diamond, stated by him to be worth $20; one gold collar button, stated by him to be worth $10, one small gold stick pin set with a diamond, stated by him to be worth $20, one gold locket set with a diamond, attached to a gold chain, both stated by him to be worth $20, one pearl handled knife, stated by him to be worth $4, one open faced gold Elgin watch with the monogram 'T. P. C.' on the case, stated by

him to be worth $40, one pair gold cuff links, stated by him to be worth $20, one black leather travelling bag containing various articles of clothing; . . . that Farrell had in his possession money amounting to about $117; one New York, New Haven & Hartford Railroad Company five hundred mile ticket, containing three miles, stamped 'Stamford, Conn., Oct. 9, 1916,' one Elgin gold watch, stated by the defendant Farrell to be worth $28, one gold ring set with a diamond, stated by him to be worth $425, one platinum watch chain, fourteen inches long, stated by him to be worth $50, one crown stick pin set with diamonds and sapphire, stated by him to be worth $65, one pair pearl cuff links with diamond, stated by him to be worth $15, one gold stud with diamond, stated by him to be worth $20, one gold handled knife set with two small diamonds with the initials 'M. F.' engraved on handle, stated by him to be worth $10, and one black leather travelling bag containing the pair of shoes, clothing and other articles. It was admitted by the Commonwealth that none of the specific articles taken from the Wallace residence were found in the possession of the defendants, or of any one else connected with the defendants." The defendants objected to this evidence unless it could be shown that these articles "had some connection with, or relation to, the breaking and entering of, and larceny in, the Wallace residence, or could be identified as property stolen from the Wallace residence." No other ground of objection appears then to have been suggested.

It is manifest that this ground of objection is not sound. The possession of property of considerable value, whether jewels or money, although not identified as a part of the property stolen, is nevertheless a circumstance proper for the consideration of the jury as tending to show property in the hands of the defendants subsequent to the alleged larceny. Such evidence is competent in the case at bar. Its weight may be trivial or cogent according to other conditions shown. It might be slight against a person of affluence and of extravagant habits. It might be of importance against one of small estate or of no visible means of support. There was evidence tending to show that neither of the defendants had worked for a year and that when arrested they declined to tell where they were on the date of the crime alleged. As to

Coyne, it appeared that when arrested he said in substance that once he had been an inmate of Concord reformatory and was an engraver by occupation; that a witness called by him testified that he had known Coyne for many years, that he did not know what his business was, and that he knew he had worked in a rope factory about eight years before and had been employed in a bakery three or four years before for a few weeks. As to Farrell, it appeared that his sister testified that he had made his home with her for some years, that she saw him at her house every two or three weeks, that she never inquired as to his business and did not know what it was or whether he had any, that she understood he was a travelling salesman and that she knew he had travelled for a varnish house.

This state of evidence does not indicate commonly such a state of financial resourcefulness as accompanies the ownership of the kind and amount of jewelry and diamonds found in the possession of these defendants. The ordinary law abiding man, whether artisan or of other occupation, who has not worked for a year and whose friends or family do not know his business, does not commonly carry about with him for personal use and adornment diamonds and other jewelry of $1,600 value, as did one of these defendants, or even of $600 value, as did the other defendant.

Of course this evidence standing alone does not prove criminal conduct. But there were strong accompanying circumstances of guilt of an independent character. As was said by Mr. Justice Holmes in *Commonwealth* v. *Mulrey*, 170 Mass. 103, at pages 110, 111, "it is not necessary that every piece of evidence admitted should be sufficient by itself to prove the crime. Evidence which would be colorless if it stood alone may get a new complexion from other facts which are proved, and in turn may corroborate the conclusion which would be drawn from the other facts. . . . It is possible that" these defendants "may have had an independent fortune from which" these jewels were purchased, "but that was open to" them to prove if they "saw fit and was not the probability with regard" to persons in their general situation. Upon the authority of that decision and of *Commonwealth* v. *Montgomery*, 11 Met. 534, this evidence was admissible. If there is anything inconsistent with

this conclusion in *Williams* v. *United States*, 168 U. S. 382, 396, it is equally inconsistent with our law as declared in the authorities just cited. Indeed, the soundness of the federal decision has been doubted. See Wigmore on Evidence, § 154.

The evidence was not too remote in time. It can hardly be said as matter of law that an interval of about two months had broken the reasonable probability of connection between the amount of booty secured by the burglary charged in the indictment and the possession of the jewels found upon the defendants at the time of their arrest.

It was not equivalent to the admission of evidence of another crime. That was not the ground on which it was received. The jury were not permitted to consider it in that connection. But the jury were instructed carefully to disregard this evidence upon the question of breaking and entering and to consider it only if the breaking and entering was found to be proved by independent evidence, and even then only if it was found that the defendants "had no other source of income to account for the possession of the property found in their possession, and if they also found that the money and jewelry were the proceeds, or a part of the proceeds, of the property stolen from the Wallace residence, they might consider this evidence in so far as this property accounts for the defendants not having the specific articles stolen in their possession when arrested; that otherwise they were to disregard the evidence entirely." No exception was taken to the charge. But the defendants have no just ground for complaint in the particulars which have been argued.

Exceptions overruled.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *vs.* BENJAMIN S. CLARKE.

Worcester. October 1, 1917. — October 20, 1917.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

Covenant, Running with the land. *Railroad*, Duty to fence. *Fence*. *Pleading, Civil*, Declaration, Common counts. *Practice, Civil*, Exceptions, Amendment.

A covenant in a deed to a railroad corporation that the grantor will and that his heirs, executors and administrators shall make and maintain at all times thereafter a good and sufficient fence or fences or wall or walls on the boundary lines between the grantor's own land and the granted premises, "which fences or walls shall be forever kept, maintained and made at my expense and the expense of my heirs, executors, administrators and assigns," is a covenant running with the land and binding on the grantor's successors in title.

Review by LORING, J., of the successive statutes in regard to division fences between railroad locations and the land of adjoining owners.

Under the provision of St. 1879, c. 205, § 2, as now embodied in St. 1906, c. 463, Part II, § 104, that, "If a person other than the railroad corporation is required by law or contract to erect or maintain fences along a part of the line of the railroad, the corporation shall erect such fences or keep them in repair as provided in the preceding section, and may recover the reasonable cost thereof in an action of contract from such person," an owner of adjoining land, who is bound by a covenant in a deed to make and maintain a division fence between his land and the location of the railroad, has the right at his election to build and maintain the division fence, and the right of the railroad corporation to build the fence at the reasonable expense of the landowner only arises when the landowner has elected not to perform the work himself.

Where the declaration in an action of contract contains only a count on an account annexed for work done and materials furnished, the plaintiff cannot recover for a breach of a covenant in a deed without amending his declaration by substituting or adding a count for breach of the covenant.

In an action of contract where the presiding judge ordered a verdict for the defendant, and the verdict was ordered rightly upon the pleadings, and it did not appear that the judge did not order the verdict for the defendant upon the pleadings, but it appeared that by amending its declaration the plaintiff would have a right to go to a jury, upon exceptions alleged by the plaintiff, it was *ordered* that the plaintiff should have leave to amend its declaration and that, if such an amendment should be filed in the Superior Court within a required time, the case should stand for trial; and that otherwise the exceptions should be overruled.

CONTRACT by the New York Central and Hudson River Railroad Company, a corporation, as the lessee of the Boston and

Albany Railroad Company, for $257.96 "for work, labor and material, as shown on the account hereto annexed, together with interest thereon, from the twelfth day of November, 1914, when the same became due and payable." Writ in the Central District Court of Worcester dated December 22, 1914.

On appeal to the Superior Court the case was tried before *White*, J. The material facts as shown by the evidence are stated in the opinion. The judge ruled that upon the whole evidence the plaintiff was not entitled to recover and ordered a verdict for the defendant. At the request of the parties the judge reported the case for determination by this court, with the stipulation that, if the ruling and the ordering of the verdict were right, then judgment was to be entered for the defendant on the verdict; but, if the case ought to have been submitted to the jury, then judgment was to be entered for the plaintiff in the sum of $220.

St. 1879, c. 205, § 2, in its present form as embodied in St. 1906, c. 463, Part II, § 104, is as follows: "If a person other than the railroad corporation is required by law or contract to erect or maintain fences along a part of the line of the railroad, the corporation shall erect such fences or keep them in repair as provided in the preceding section, and may recover the reasonable cost thereof in an action of contract from such person. If he is an owner of land adjoining such line, the corporation shall also have a lien upon said land for labor performed and furnished and all materials furnished and used by it in erecting and repairing such fences upon such land, and for the costs which may arise in enforcing it; and it shall be enforced in the manner provided for enforcing liens in chapter one hundred and ninety-seven of the Revised Laws."

W. L. Parsons, for the plaintiff.

W. E. Sibley, C. H. Sibley & C. M. Blair, for the defendant, submitted their case without argument or brief.

LORING, J. In 1834 the defendant's predecessor in title conveyed to the Boston and Worcester Railroad Corporation, the plaintiff's predecessor, the land covered by the railroad location now owned by the plaintiff. The location divided the farm then owned by the defendant's predecessor in title into two parts. By his deed the defendant's predecessor agreed that he would and his heirs, executors and administrators should make

and maintain at all times thereafter a good and sufficient fence or fences or wall or walls "on the boundary lines between my own lands aforesaid and the premises above granted, which fences or walls shall be forever kept, maintained and made at my expense and the expense of my heirs, executors, administrators and assigns." In September, 1914, the defendant purchased the farm bounded on one side by the railroad location in question. At that time he wrote to the plaintiff stating that he had bought the farm and notifying it that the fence "along this line is in such condition that no cattle can be turned on same" and asking to have the fence repaired. He added that he was aware that some seventy years ago his predecessor in title had agreed to keep the fences in repair but that he was advised that this agreement was no longer in effect. He also stated that he had been advised that he could look to the plaintiff "to repair these fences." On receipt of this letter the plaintiff wrote to the defendant stating that its understanding was that the defendant had succeeded to the obligations contained in the deed from the original owner of the farm to the plaintiff's predecessor in title and "that you are, therefore, liable to us for any expenses that we may be at in constructing and maintaining fences on this line." The plaintiff then stated that it had asked the chief engineer to have the fences put up and that it would look to the defendant for repayment of the cost. Thereupon the plaintiff erected a wire fence on the division line between the railroad location and the defendant's land that cost the plaintiff $257.96. Upon the defendant refusing to pay, this action was brought to recover that sum as the cost of erecting the division fence. So much was agreed upon by the plaintiff and the defendant and they went to trial on the "suitableness of the said fence" and the "reasonableness" of the cost. There was evidence that the cost was reasonable. At the conclusion of the evidence the judge directed the jury to find a verdict for the defendant and by request of the parties reported the case for the determination of this court with a stipulation that, if such ruling and direction were right, then judgment was to be entered for the defendant on the verdict, but if the case ought to have been submitted to the jury, then judgment was to be entered for the plaintiff, with damages assessed in the sum of $220.

1. The covenant entered into by the defendant's predecessor in

title ran with the land. *Bronson* v. *Coffin*, 108 Mass. 175. It follows that, apart from statutes which we are about to consider, it was the duty of the defendant to build the fence and, upon his failing to perform the covenant which had thus become his, the plaintiff could recover damages coming to it by reason of this breach of the covenant.

2. No argument was made by the defendant in this court. From the letter written by him in September, 1914, we assume it to be his contention that the duty of making and maintaining the division fence, which by the deed between the predecessors in title of both parties was put upon the grantor and so upon the defendant, has been transferred to the railroad by statutes of which St. 1906, c. 463, Part II, § 104, is a re-enactment.

Whether that be the true construction of those statutes is a question which requires a short review of the law as to division fences between a railroad location and the land of the adjoining owner. The law on this point was set forth at length in *Menut* v. *Boston & Maine Railroad*, 207 Mass. 12. But, for the purpose of determining the construction of the statutes in connection with the question now before us, it is necessary to restate the law from the point of view here involved. No statutory provision on the subject was enacted when railroads were first constructed in this Commonwealth. As a result the respective rights and duties of the railroad and the adjoining owner were those of adjoining owners at common law. At common law an owner had to keep his cattle from straying on to the land of his neighbor. The duty of fencing therefore rested upon the owner who wished in this way to keep his cattle at home. The consequence of this was that when land within the railroad location was taken by eminent domain the expense of erecting and maintaining a division fence was one of the elements of compensation to which the landowner was entitled. *Boston & Worcester Railroad* v. *Old Colony Railroad*, 12 Cush. 605. And, where the land within the railroad location was bought, it was presumed to include the cost of fencing by the grantor. *Stearns* v. *Old Colony & Fall River Railroad*, 1 Allen, 493, 494. *Menut* v. *Boston & Maine Railroad*, 207 Mass. 12, 16. This continued to be law on the subject until 1841. By St. 1841, c. 125, § 1, the county commissioners were required when assessing damages for land taken by a railroad to direct the railroad to construct

and maintain the division fence. Afterwards St. 1846, c. 271, § 3, directed that every railroad thereafter constructed should erect and maintain division fences. And this continued to be the law of the Commonwealth until St. 1879, c. 205, was enacted. Before stating the terms of that act we pause to point out the situation as to division fences which then existed. They were as follows: (1) In the case of all railroads constructed before 1841 the duty of maintaining the division fence was upon the landowner in the absence of an agreement upon the subject. (2) In case of railroads built after 1841 and before 1846 the situation was the same except in cases where the land within the railroad location had been taken by eminent domain and the damages had not been agreed upon. In that class of cases the county commissioners have been required to put the duty of building and maintaining the division fence upon the railroad. (3) In the case of all railroads built after 1846 the duty of building and maintaining the division fence was upon the railroad. When railroads were first constructed in this Commonwealth the question of division fences was treated as a question between the adjoining owners of land as we have already said. But there was another element involved in the matter and that was the peril to the public travelling upon the railroad for accidents caused by cattle straying upon the location. Doubtless that view of the matter led to the enactment of St. 1841, c. 125, and St. 1846, c. 271. The confusion of the rights of parties which we have stated above and the peril to the travelling public in case of the first and second classes of railroads (stated above) led to the resolve of 1877, c. 39, by which the railroad commissioners were instructed to consider "whether any further legislation is necessary for the protection of the public, in regard to fencing the railroads within the limits of this State." The railroad commissioners made a detailed report upon this subject which is to be found in their report for the year 1878, 133, *et seq.* In that report the history of the law and the confusion in the three classes of cases is set forth. In addition the commissioners considered at length the question of the vested rights of the parties in these three classes of cases and the best way to deal with them. No final recommendation on this point was made by the commissioners.

Thereafter St. 1879, c. 205, was enacted. By § 2 it is provided that whenever the duty of erecting or maintaining division

fences has been or is by law or contract imposed upon any person other than the railroad, the railroad shall thereupon erect such fences and keep the same in repair "and may recover the reasonable cost thereof in an action of contract from such person." That statute is now St. 1906, c. 463, Part II, § 104. When the duty of erecting and maintaining division fences had been by law or contract imposed upon the adjoining owner before St. 1879, c. 205, § 2, was enacted, it was the duty of the adjoining owner to do the work of erecting and maintaining the fence. Whether it would have been within the constitutional power of the Legislature to provide that thereafter the railroad should erect and maintain the fence and the landowner should pay the cost of the railroad's doing so we do not find it necessary to consider. To the farmer there is a difference between the burden of erecting and maintaining a fence and paying another person the cost of doing so. The difference found expression in a statute not now in effect which gave a taxpayer the right to work out his taxes by work upon the highways. Gen. Sts. c. 44, § 7. We do not find it necessary to determine whether the difference between the two is of such moment that the Legislature could have substituted one for the other. For we are of opinion that in view of the history of the matter the Legislature did not intend to interfere with the vested rights of the parties in this connection. Before the enactment of St. 1879, c. 205, § 2, the adjoining landowner had the right to erect and maintain the fence with his own material and by his own labor. And we are of opinion that by the true construction of that act he still had the right at his election to do so and that it is only on his election to let the railroad do the work at his expense that the railroad could do the work and collect the cost from him.

The plaintiff has contended that on the facts in evidence in the case at bar the jury were warranted in finding that the defendant had elected not to do the work himself but to let the railroad do it at his expense. We are of opinion that this contention cannot be upheld. In his letter to the plaintiff the defendant said that he had been advised that the contract made by his predecessor "has no longer any value" and that "I can look to you to repair these fences." To that the plaintiff answered that its understanding was that the defendant had succeeded to the obligations of his

predecessor in title and "that you are, therefore, liable to us for any expense that we may be at in constructing and maintaining fences on this line." It added that they would have the fence built and look to the defendant for payment. To this the defendant made no reply. Had the defendant on receipt of this letter from the plaintiff told the plaintiff to go ahead, he doubtless would have made his election and acquiesced in the plaintiff doing the work at his expense. See, in this connection, *Cheney* v. *Boston & Maine Railroad*, 227 Mass. 336. But he did nothing at all. The case therefore was at an impasse. The defendant insisted that the plaintiff was bound to build the fence at its own expense; the plaintiff insisted that it had a right to build it at the defendant's expense. And the parties left the matter at that point. In this state of the case no inference was warranted that the defendant had elected not to build the fence with his own material and at his own expense and had agreed that it should be built by the plaintiff at his expense.

If the plaintiff had declared upon the covenant made in 1834, which was binding on the defendant because it ran with the land, and sought to recover damages for breach of that covenant by the defendant, judgment now could be entered for the plaintiff in the sum of $220 under the stipulation that "if the case ought to have been submitted to the jury then judgment is to be entered for the plaintiff, with damages assessed in the sum of $220." But the only count in the plaintiff's declaration was a count for work done and material furnished, and under that count the plaintiff cannot recover damages for a breach of the covenant. The ground on which the presiding judge directed the jury to find a verdict for the defendant is not stated in the report. If the ordering of the verdict was made on the pleadings it was right and the ruling cannot be said to have been wrong. If based upon the pleadings it was right and it does not affirmatively appear that it was not based upon the pleadings. *Noyes* v. *Caldwell*, 216 Mass. 525. *Baxter* v. *Boston & Maine Railroad*, 217 Mass. 312, 314. The stipulation therefore that judgment might be entered for the plaintiff in the sum of $220 "if the case ought to have been submitted to the jury" does not apply.

We are of opinion that the plaintiff ought to have leave to amend by substituting or adding a count for breach of the covenant and

that that amendment ought to be allowed without costs to either party. If such amendment is filed in the Superior Court within sixty days the case is to stand for trial; if not, the exceptions are overruled.

So ordered.

MINNIE KERR & another *vs.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.
WILLIAM P. KERR *vs.* SAME.

Worcester. October 1, 1917. — October 20, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, Street railway.

In an action by a woman against a street railway corporation for personal injuries sustained in alighting from a car of the defendant in which the plaintiff was a passenger, where the plaintiff testifies that as she was alighting from the car the heels of both her shoes came off, having got caught in the step of the car, but there is nothing to show either the character or the condition of the step, there is no evidence of negligence for submission to the jury.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries sustained by her on June 4, 1915, when she was alighting as a passenger from a car of the defendant, and alleged to have been caused by the defective and improper condition of the step of the car, and the second action by the husband of the plaintiff in the first case for expenses incurred by reason of such injuries to his wife. Writs dated August 19, 1915.

The cases were tried together before *O'Connell*, J. The plaintiff in the first case testified that on June 4, 1915, late in the evening she took a car of the defendant to go to her home on Canterbury Street in Worcester, and that the car stopped just before it got to Grand Street. This plaintiff described the accident as follows: "I alighted, and when I stepped down my heel got caught in the step — it took the two heels off and I fell to the ground. . . . It got caught on the step and I slid right on the ground and my back struck the step." This plaintiff also testified that she did not look back to see what it was that caught in the heel; she stepped squarely

on the step; she did not step on the edge of the step. The car in which she was travelling on the night of the accident was a closed car with long seats on the side; it was an old car. She "did not remember the particular kind of a step on the car; she did not examine the car to see what had caught her heel."

At the close of the testimony introduced by the plaintiffs, the judge ordered a verdict for the defendant in each of the cases; and the plaintiffs alleged exceptions.

The cases were submitted on briefs.

W. C. Foley, for the plaintiffs.

C. C. Milton, J. M. Thayer & F. H. Dewey, for the defendant.

BY THE COURT. The female plaintiff testified that, as she was alighting from a car of the defendant, the heels of both her shoes came off, having got caught in the step. There was no evidence as to the kind of step on the car or as to its condition. Plainly there is nothing in the record to indicate negligence on the part of the defendant or those for whose conduct it was responsible. *Thomas* v. *Boston Elevated Railway*, 193 Mass. 438. *Perkins* v. *Bay State Street Railway*, 223 Mass. 235.

Exceptions overruled.

HASSAN MAMMOTT *vs.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Worcester. October 2, 1917. — October 20, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, In disposal of ashes. *Proximate Cause.*

In an action against a street railway corporation, which was not a subscriber under the workmen's compensation act, by a workman employed by the defendant to pull out ashes from under the boilers in its power house, load them into a wheelbarrow or truck and empty them into an ash pit usually partly filled with water, for injury to one of the plaintiff's eyes from the hot ashes splashing up with steam and heat after the plaintiff had tipped a load of ashes into the pit, it appeared that the plaintiff had been engaged in this work for more than a year and that the same method of disposing of the ashes had been in use during the whole of that time, and there was no contention that this method was not proper and usual, and it was *held*, that there was no evidence of negligence on the part of the defendant.

In the same case it appeared that there was a water pipe under the boilers from which little streams of water trickled out. One witness testified that this was to wet the ashes and that, if the ashes stayed there long enough, they became cool. Another witness testified that this water was "to keep the clinker bar cool." The plaintiff testified that at the time of the accident this water had stopped coming down, and that sometimes the water did not come down when there was a fire. *Held*, that on all the testimony it could not have been found that the failure to cool the ashes with water was negligence of the defendant directly causing the plaintiff's injury.

TORT for personal injuries sustained on November 14, 1913, by the burning of one of the plaintiff's eyes when the plaintiff was employed by the defendant to remove the ashes from under the boilers of the defendant's power house at Millbury and to dump them into a pit maintained by the defendant for that purpose. Writ dated March 26, 1915.

In the Superior Court the case was tried before *Keating*, J. The evidence is described in the opinion. At the close of the plaintiff's evidence the judge ordered a verdict for the defendant, and, at the request of the parties, reported the case for determination by this court. If the ordering of the verdict was right, judgment was to be entered for the defendant. If the judge was in error in ordering a verdict for the defendant, judgment was to be entered for the plaintiff in the sum of $325.

The case was submitted on briefs.

E. A. Ryan, J. F. Ryan & G. McInerny, for the plaintiff.

C. C. Milton, J. M. Thayer & F. H. Dewey, for the defendant.

RUGG, C. J. The plaintiff was in the employ of the defendant at its power house. His work was to pull the ashes out from under the boilers, load them into a wheelbarrow or truck, take them to a pit and tip them into the pit, which commonly was partially filled with water. He had been thus engaged for more than a year. He had always found the ashes hot or "red hot," and sometimes pieces of coal or "big chunks of coal" came down with the ashes "always hot." On the occasion here in question, as he tipped the ashes into the pit, to quote his testimony, "the water flashed up with steam and heat . . . the ashes flared up right into his face and burned his eye: the ashes were red hot." The plaintiff "moved hot ashes into the pit at other times, at which times they flashed up the same as they had before into his eye. Sometimes the ashes didn't have a chance to cool."

The defendant was not a subscriber under the workmen's compensation act. The only question is whether there was evidence of negligence of the defendant.

The workmen's compensation act does not enlarge the duty of an employer who is not a subscriber, nor transform into negligence conduct which apart from that statute would impose no liability upon him. Negligence is a breach of some legal obligation, imposing the performance or omission of particular conduct. There can be no negligence where there is no duty. *Walsh* v. *Turner Centre Dairying Association*, 223 Mass. 386. *Bernabeo* v. *Kaulback*, 226 Mass. 128.

There is no evidence of negligence on the part of the defendant. There is no suggestion that this method of disposal of ashes was not proper and usual. It had been followed during the entire period of the plaintiff's employment. He appears to have been fully aware of all the ordinary incidents of his work, including the matter of common knowledge that when a body is thrown into water there is liable to be a splash. No warning was required. *Whalen* v. *Rosnosky*, 195 Mass. 545. *Sakas* v. *Lumsden & Van Stone Co.* 214 Mass. 429.

Coal was fed to the boilers by a stoker, and there was a water pipe under the boilers from which, according to one witness, "little streams of water trickle out . . . to wet and dampen the ashes and, if the ashes stay there long enough, they become cool." According to another witness this water was "to keep the clinker bar cool." There was testimony by the plaintiff that at the time of the accident this "water stopped to come down. . . . Sometimes the water did not come down when there was a fire." On all the testimony it could not have been found that the failure to cool the ashes with water constituted negligence of the defendant having a causal connection with the injury. *Archer* v. *Eldredge*, 204 Mass. 323.

Exceptions overruled.

EDWIN F. LYFORD, executor & trustee, *vs.* FLORENCE O. McFETRIDGE & others.

Hampden. September 25, 1917. — October 22, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Devise and Legacy, Lapsing of legacy. *Interest. Executor and Administrator.*

Where a testator by his will gave to his wife the income of the residue of his estate during her lifetime and upon her death gave all the property to a trustee, directing him to pay certain pecuniary legacies and to hold the residue in trust for the benefit of certain beneficiaries for life, and where it was agreed for the purposes of the case that the testator and his wife were killed by an accident "at the same instant of time," it was *held*, that, the testator's wife not having survived him, the life interest created for her benefit lapsed, and the pecuniary legatees in remainder, all of whom were living at the time of the testator's death, became entitled to their legacies.

In the same case it was *held* that, the will having provided that the pecuniary legacies should be paid by a trustee, the payment of such legacies was in legal effect the same as if the testator had directed that it should be done by the executor of his will, and accordingly that the usual rule was applicable, that an executor is not chargeable with interest on pecuniary legacies until the expiration of one year from the death of the testator.

BILL IN EQUITY, filed in the Probate Court of the county of Hampden on September 13, 1915, by Edwin F. Lyford, the executor of and trustee under the will of Sherman D. Porter, late of Springfield, for instructions.

On appeal to the Supreme Judicial Court the case was heard by *Pierce*, J. At the hearing, the allegations of fact contained in the bill were admitted to be true, and in addition the parties filed the following statement of agreed facts: "The parties to the above entitled case agree that for the purposes of this case the court may take it to be a fact that Sherman D. Porter and his wife, Elizabeth T. Porter, perished on the 26th day of August, A. D. 1913, in a common disaster caused by the collision of a railroad train with an automobile in which they were riding, and that they died at the same instant of time. The parties further agree that there are sufficient assets in the estate of Sherman D. Porter to pay interest on the several

legacies of the respective appellants from the date of the death of Elizabeth T. Porter and to leave in addition thereto a considerable residue to the town of East Longmeadow and the Springfield Hospital. Ethan Taylor, Maybelle Taylor Allen, Alfred H. Taylor, and the city of Springfield wish it to be understood that their reason for entering into this agreement is that in the opinion of their counsel it is not material in this matter to determine whether Mrs. Porter survived her said husband, but that to prove such fact, i. e., that Mrs. Porter did survive her husband, would necessitate the expenditure of an amount of time and money that in their counsels' opinion would be far larger than the amount at issue in this matter would justify."

At the close of the hearing four of the defendants, as explained in the opinion, asked the single justice to make the following ruling: "On all the evidence, these defendants are entitled to interest on their respective legacies contained in the clauses of the residuary bequest numbered 'thirteenth,' 'fourteenth' and 'fifteenth,' each amounting to the sum of $15,000 and 'thirty-sixth,' amounting to the sum of $10,000, at the rate of six per cent per annum from August 26, 1913, the date of the death of Elizabeth T. Porter."

The justice refused to make this ruling and ruled that those defendants were entitled to interest on their respective legacies from one year after the death of Sherman D. Porter. Those defendants alleged exceptions. The proceedings by which two other defendants, who afterwards became parties to the suit, were permitted to join in the exceptions by an order of consolidation and a stipulation of the parties are stated in the opinion.

W. H. McClintock, for the defendants Florence O. McFetridge and others.

R. A. Bidwell, for the defendant the city of Springfield.

C. H. Beckwith, for the defendant the Springfield Hospital.

BRALEY, J. The exceptions present only questions of law raised by the appellants and defendants Ethan Taylor, Maybelle Taylor Allen, Alfred H. Taylor and the city of Springfield, as the appellants Florence O. McFetridge and Helen M. Olmstead did not become parties to the suit until after the allowance of the exceptions. In the motion for leave "to make a late entry of their appeal" they also ask that the appeal may be heard by the full court, and the

record shows that leave was granted with an order that the "appeals may be consolidated." R. L. c. 162, § 13. It resulted from this order that three of the defendants had been heard and their rights determined by the single justice; while as to the other respondents the case remained undecided. But, the question in issue being common to all the appeals, whatever embarrassment might have arisen from this state of the record has been obviated by the stipulation of Florence O. McFetridge and Helen M. Olmstead filed at the argument before this court, that they were content to abide by the decision in the pending exceptions. St. 1913, c. 716, § 2. As we are of opinion that the exceptions must be overruled, nothing appears as to all the defendants why the case then would not be ripe for the entry of a final decree. *Prescott* v. *Prescott*, 175 Mass. 64, 68. See *Kennedy* v. *Welch*, 196 Mass. 592, 594; *McCusker* v. *Geiger*, 195 Mass. 46, 52.

By his will which has been duly proved and allowed, the testator, after making several legacies, provided in part as follows: "Third: All the rest and residue of my estate, real, personal or of whatever nature and wherever located, I give, devise and bequeath to my said wife in trust for the following purposes, namely:

"1st. To pay out of the income thereof the sum of Twenty-five ($25.00) Dollars per month to the said Kittie Porter Spellman, during the lifetime of my said wife, unless the said Kittie Porter Spellman should die before my wife, and in such case during the lifetime of the said Kittie Porter Spellman.

"2nd. To pay out of the income thereof the sum of Twenty-five ($25.00) Dollars per month to the said Libbie Porter Davis, during the lifetime of my said wife, unless the said Libbie Porter Davis should die before my said wife, and in such case during the lifetime of the said Libbie Porter Davis.

"3rd. To have and enjoy all the remaining use income and improvement thereof herself, during her life with full power to use and expend the same for such purposes as she may choose. I also authorize and empower her to sell any or all of said trust estate, whether real or personal or of whatever nature (except such as may be herein specifically bequeathed in remainder after her death either at public auction or private sale, and in such manner and at such time or times and as a whole or in such portions as she may think best, for the purpose of reinvestment and to invest and reinvest

the proceeds at her discretion, and to execute, acknowledge and deliver such instruments as may be proper to transfer the property sold or in connection with such transfer or sale and no purchaser to be obliged to see to the application of the purchase money. My executors are authorized to transfer to her any or all of the personal property which she may be entitled to receive under this trust in the form in which I leave it invested instead of converting it into cash, and it is my will that she be at liberty to retain any of the investments in that form or (except in the case of such property as may be specifically bequeathed in remainder after her death) to invest in a different manner at her discretion, and that she shall not be limited to such investments as are ordinarily required in the case of trustees.

"Payment or transfer to her of the property to which she is entitled under this trust and her receipt therefor shall be a complete discharge of my executors, and I request that she be exempt from furnishing any surety or sureties upon her bond as trustee.

"Fourth: From and after the death of my said wife, I give, bequeath and devise the remainder of my property, real, personal and of every description to Edwin F. Lyford of said Springfield, his heirs and assigns in trust for the following purposes however, namely: —"

"Thirteenth: To pay to the said Ethan Taylor, Fifteen Thousand ($15,000.00) Dollars.

"Fourteenth: To pay to the said Maybelle Taylor Allen, Fifteen Thousand ($15,000.00) Dollars.

"Fifteenth: To pay to the said Alfred H. Taylor, Fifteen Thousand ($15,000.00) Dollars."

"Twenty-ninth: To pay to the Springfield Hospital, Ten Thousand ($10,000.00) Dollars."

"Thirty-sixth: To pay to the City of Springfield, Massachusetts, the sum of Ten Thousand ($10,000.00) Dollars, to be expended by it on public parks. Payment of said sum by my trustee to the Treasurer for the time being of said City, and his receipt therefor, shall be a complete discharge of my trustee so far as this item of his trust is concerned."

The third clause gives his wife, if living at his death, the entire income for life of the residue of his estate, with the exception of the bequests to Kittie Porter Spellman and Libbie Porter Davis, and

at her death the equitable remainders would become operative. *Gifford* v. *Choate*, 100 Mass. 343. *McCarty* v. *Cosgrove*, 101 Mass. 124.

But as agreed by the parties the testator and his wife "died at the same instant of time" by reason of "the collision of a railroad train with an automobile in which they were riding." The will of course speaks from the testator's death, and, his wife not having survived him and there being no tenant in whom the estate could vest in title and possession, the life estate created for her benefit lapsed and the legatees in remainder, all of whom were living at his death, became entitled to their respective legacies. *Prescott* v. *Prescott*, 7 Met. 141. *Dow* v. *Doyle*, 103 Mass. 489. *Thompson* v. *Thornton*, 197 Mass. 273.

The interposition of a trustee leaves the defendants in legal effect as if the testator had directed payment to be made by his executor, *Claflin* v. *Holmes*, 202 Mass. 157, 159, *Parker* v. *Cobe*, 208 Mass. 260, 263, 264, *Gilbert* v. *Bachelder*, 223 Mass. 329, and the usual rule, that an executor is not chargeable with interest on pecuniary legacies until the expiration of one year from the testator's death, is to be applied. *Kent* v. *Dunham*, 106 Mass. 586. See R. L. c. 141, §§ 19, 20, as amended by Sts. 1914, c. 699, § 8; 1915, c. 151, §§ 1, 2. The single justice accordingly rightly refused to rule, that, "On all the evidence, these defendants are entitled to interest on their respective legacies contained in the clauses of the residuary bequest numbered 'thirteenth,' 'fourteenth,' and 'fifteenth,' (each amounting to the sum of $15,000.00,) and 'thirty-sixth' amounting to the sum of $10,000, at the rate of six per cent per annum from August 26, 1913, the date of the death of Elizabeth T. Porter."

Exceptions overruled.

HARVEY W. PARTRIDGE, executor, *vs.* DAVID A. CLARY & another.

Berkshire. September 11, 1917. — October 23, 1917.

Present: RUGG, LORING, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Devise and Legacy. Trust, Termination. *Release. Estoppel.*

A testator devised and bequeathed the residue of his estate to his executors as trustees to pay during the life of his wife one half of the net income to his wife and the other half of the net income to his son and, upon the death of his wife, to pay, convey and deliver all the property to his son, "to have and to hold to him and his heirs and assigns forever." *Held*, that the son took a vested remainder.

Under the will above described the residue amounted to $63,300. The executors paid to the wife $23,837.46 and to the son, who was of age, $39,462.54 and took from each a release under seal acknowledging full satisfaction of all claims against the estate and the executors. The release of the son was of all claims or demands to be made by him or his heirs or legal representatives. The son died nineteen years after this transaction and the testator's widow died four years later. Thereupon the surviving executor of the will filed his account asking for the allowance of the two payments stated above. The children of the son appealed from a decree allowing the account. *Held*, that, if the executors as trustees had no right to end the trust and distribute the fund when they did so, the appellants, claiming as the children of the son, had no standing in court to complain of it, being bound by their father's release under seal.

It also was *held* that, even if it were open to the appellants to object to the transaction by which the trust property was divided, there was nothing to show that the widow and the son did not receive each the full value of their respective interests in the $63,300, in the division of which the son had acquiesced during the nineteen years that he had lived thereafter.

APPEAL from a decree of the Probate Court for the county of Berkshire allowing the final account of the sole surviving executor of the will of David A. Clary, late of Pittsfield, who died on April 2, 1891. The appellants were David A. Clary and Ethel May Clary, who were the children of Gordon McKay Clary and the grandchildren of the testator.

The case came on to be heard by *Crosby*, J., who, at the request of the parties, reserved it upon a case stated and the reasons for appeal for determination by the full court. The essential facts and the contentions of the appellants are stated in the opinion.

The will of David A. Clary was dated March 23, 1891, and was allowed on May 5, 1891. The material provisions of the will were as follows:

"Seventh. All the rest, residue and remainder of my estate and property owned by me at the time of my death, after all the foregoing provisions of this will are fully carried out and performed, I give, devise and bequeath said rest, residue and remainder as follows, to wit:

"I will and direct that the same be held, invested and reinvested as occasion requires by my executors acting as trustees, or by some other person to be appointed trustee if they do not act, — and one half of the net income thereof be paid over from time to time to my said wife during her life, and the net income of the other half be paid over from time to time, to my said son Gordon McKay Clary during the life of my said wife; and at the time of the decease of my said wife, the principal of the trust property then remaining in the hands of the trustees or trustee as the case may be, shall be paid over, conveyed, and delivered to my said son Gordon McKay Clary discharged of all trust, to have and to hold to him and his heirs and assigns forever."

The case was submitted on briefs.

W. C. Kellogg & H. W. Smith (of New York), for the appellants.

J. F. Noxon & M. L. Eisner, for the appellee.

LORING, J. This is an appeal from a decree allowing the first and final account of the survivor of the executors of the will of the appellants' grandfather. The grandfather bequeathed the residue of his estate to the executors of his will in trust to pay the income to his wife and son during the life of his wife and then to pay over, convey and deliver the corpus to the son. It was found that the residue came to $63,300. Thereupon the executors paid to the wife $23,837.46 and to the son $39,462.54 on receiving from each a release under seal in which full satisfaction was acknowledged of all claims against the estate and the executors. These releases were filed in the Probate Court on January 14, 1892. We assume that they were filed under the statute enacted to give executors, administrators, guardians and trustees who settle their accounts out of court a right to have recorded in the Probate Court any instrument acknowledging performance of their duty. St. 1864, c. 93, now R. L. c. 162, § 48. The son (father of the

appellants) died intestate in 1911 and the widow died in 1915. Ten months later the account here in question was filed by Partridge (the appellee) as the surviving executor of the will of the testator. The other executor was the testator's wife. In this account the surviving executor asked to be allowed for the two payments of $39,462.54 and $23,837.46. The account was allowed by the Probate Court and the appeal now before us was taken by two children of the son. Their objection consists in the allowance of the two payments of $39,462.54 and $23,837.46.

The appellants' first contention is that the remainder over upon the death of the testator's widow was a contingent remainder and never vested in their father. This contention is based upon the fact that no words of present gift are to be found in the clause of the will which creates the gift over. The gift over is created by a direction to pay, convey and deliver upon the death of the widow. The appellants rely in this connection upon *Eager* v. *Whitney*, 163 Mass. 463, *Heard* v. *Read*, 169 Mass. 216, *Crapo* v. *Price*, 190 Mass. 317, *Brown* v. *Wright*, 194 Mass. 540, *Boston Safe Deposit & Trust Co.* v. *Blanchard*, 196 Mass. 35, *White* v. *Underwood*, 215 Mass. 299. But there is no direction to pay, convey and deliver to any one but the son. The direction is to pay, convey and deliver to the son "to have and to hold to him and his heirs and assigns forever," that is to say, to the son in fee and absolutely. For the reason that there is no gift to any one but the son we do not reach in the case at bar the question which was decided in *Welch* v. *Blanchard*, 208 Mass. 523 (namely, that a remainder otherwise a vested remainder is not made a contingent one by reason of the fact that it is created without words of present gift by a direction to pay). Much less do we reach the question decided in the cases relied upon by the appellants, namely, the fact that a gift made by a direction to pay only is a fact which with other facts may make a remainder a contingent remainder. In the event that happened (namely, the son predeceasing the widow) the testator died intestate on the death of his widow so far as the great bulk of his property is concerned if the remainder over to the son was contingent upon his surviving his step-mother. It is plain that the son had a vested remainder in the $63,300.

The question in the case at bar therefore comes to this: Can

the personal representatives of one who owned a vested remainder in a trust fund charge a trustee for ending the trust and distributing the fund between the life tenant and remainderman upon receiving from both a release under seal, each being at the time of full age and *sui juris*? It may be assumed that under the doctrine of *Claflin* v. *Claflin*, 149 Mass. 19, and the many cases following it, including *Welch* v. *Episcopal Theological School*, 189 Mass. 108, the trustee in the case at bar had no right to end the trust and distribute the fund when he did. But, assuming that to be so, the appellants have no standing to complain of it. Their standing in court is as the personal representative of their father who was the absolute owner of the remainder. He chose to agree to the untimely termination of the trust. Upon this untimely termination of the trust the appellants' father gave to Partridge (the surviving executor of the testator's will) a release in these words *inter alia*: "I hereby fully discharge and acquit said executors and all the sureties upon their official bond and said estate from any other or further claim or demand to be made by me, my heirs or legal representatives upon them or any of them or upon said estate forever." That ends the appellants' claim apart from the further contention which we are about to consider.

The next contention of the appellants is that their father could have avoided or rescinded the transaction and that this right of avoidance and rescission has come from him to them. This contention is based upon the fact that the widow was one of the executors and therefore the transaction by which the trust was terminated immediately upon its coming into existence was a transaction between trustee and *cestui que trust* to which the surviving executor was privy. But a transaction between trustee and *cestui que trust* is not void. It is however a transaction which will be subjected to a strict scrutiny. Subjecting the transaction here in question to the strictest of scrutinies there is nothing to be found in the record to warrant the inference that the widow overreached the son. Much less that the other executor was privy to a fraud practised by the widow upon the son. The son received nearly two thirds as much again as the widow. If the widow's chance of life was the normal one for a person of her age, the then present value of her life estate could be computed by a reference to standard mortality tables. But the widow's

age and her condition of health were not put in evidence in the case at bar. There is nothing to show that the widow and the son did not each receive the then present value of their interests (as life tenants and remainderman) in the $63,300. Under these circumstances it is not necessary to go further and point out that the son survived the transaction for nineteen years and by his inaction during that time ratified the transaction here complained of and that the appellants have no greater rights than he had.

The principles of law involved in this case are settled in this Commonwealth. For that reason we have not found it necessary to discuss the many cases from other jurisdictions relied upon by the appellants.

Decree affirmed with costs.

ISREAL LEFEVRE & another *vs.* CHARLES CHAMBERLAIN & another.

Berkshire. September 11, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Equity Pleading and Practice, Appeal, Decree. *Contract*, Rescission. *Equity Jurisdiction*, To rescind contract, Retaining bill. *Damages*.

In a suit in equity where a master has made a report in favor of the plaintiff, to which the defendant has filed exceptions, and, upon a hearing on the exceptions and on a motion to confirm the report, the trial judge makes an interlocutory decree overruling the exceptions, confirming the report and adopting the findings therein, from which the defendant takes no appeal, and later by order of the same judge a final decree is entered in favor of the plaintiff, from which the defendant appeals, the only question open on the appeal is whether on the record the bill can be maintained.

In a suit in equity to rescind a contract for the exchange of real estate procured by false and fraudulent representations of the defendant as to the boundaries of a farm which he conveyed to the plaintiff in exchange for a conveyance of real estate made to him by the plaintiff, it is not necessary that the plaintiff should have offered to return the farm with its appurtenant personal property to the defendant before filing his bill, if he offers in the bill to do so, and in his prayer for relief offers to make such restitution as may be ordered by the court.

In the suit in equity described above, it appeared that, after the decree ordering rescission and reconveyances and after the appeal therefrom, the buildings on the land conveyed by the plaintiff to the defendant had been destroyed partially by fire, so that if the defendant should reconvey as ordered by the decree the plaintiff's former estate would not be restored to him, and it was *held*, that under these circumstances the bill would be retained for the assessment of damages.

In the same suit it had been found by the master that the part of the farm as falsely described by the defendant which proved to be outside the actual boundaries consisted of a tract of wood and timber land which the master valued at $769.50, and the plaintiff stated without dissent on the part of the defendant that he would accept this sum as a substitute for specific relief, and it was *said* that this properly brought the measure of damages within the rule that in an action for deceit the damages are measured by the difference between the value actually received and what that value would have been if the representations had been true.

In the same suit this court under St. 1913, c. 716, § 2, having before them "all the facts necessary for determining the question in dispute," ordered an amendment of the decree by striking out the order for a rescission and reconveyances and inserting in its place an order for the payment of damages in the sum agreed.

BILL IN EQUITY, filed in the Superior Court on March 10, 1916, to rescind a contract for an exchange of real estate, in pursuance of which the plaintiffs conveyed to the defendants certain real estate on Friend Street in Adams and the defendants conveyed to the plaintiffs a farm in Savoy owned by the defendant Charles Chamberlain and called Chamberlain farm, on the ground that the defendant Charles Chamberlain falsely and fraudulently represented that the Chamberlain farm contained one hundred and twenty acres of land, whereas the deed of the defendants conveyed only seventy-three acres of land and the most valuable part of the land pointed out by the defendant Charles Chamberlain as constituting the farm was found to be outside the true boundary lines thereof. The bill alleged that after purchasing the farm and personal property from that defendant the plaintiffs, believing that the boundaries were as represented by him sold the farm and personal property to one Antonio Chaliux, and pointed out to him the boundaries which the defendant Charles Chamberlain had shown to them and represented to Chaliux that those were the boundaries of the premises they conveyed to him by their deed; that immediately before the filing of their bill the plaintiffs discovered that the representations made by the defendant Charles Chamberlain as to the acreage and his representations that the stones and iron pins pointed

out by him were the corners of his farm were false; that the plaintiffs thereupon felt bound to rescind the contract of sale they had entered into with Chaliux and rescinded that sale and thus at the time of filing this bill were the owners of the premises and the personal property conveyed to them by the defendants; that the plaintiffs called the attention of the defendants to the allegations set forth in the bill and demanded a return of the Friend Street premises, and offered to return to the defendants the premises conveyed to them and the personal property, but that the defendants refused to rescind the contract. The prayer asked that the defendants be ordered to rescind the contract and to execute, acknowledge and deliver to the plaintiffs a warranty deed of the Friend Street premises conveying a title thereto good in every manner as they had received the premises from the plaintiffs, upon the plaintiffs making such restitution to the defendants as the court should order, which the plaintiffs offered to do.

The case was referred to a master, who filed a report containing the findings that are stated in the opinion. The defendants filed exceptions to the master's report, and the case was heard by *Wait*, J., upon the defendants' exceptions to the master's report and a motion of the plaintiffs to confirm the report. The judge made an interlocutory decree overruling the defendants' exceptions to the master's report, confirming the report and adopting "the findings therein."

Later by order of the same judge a final decree was entered, ordering that upon the payment or tender to the defendants by the plaintiffs of the sum of $186, and the return or tender of the personal property mentioned in the master's report and the delivery or tender of a good and sufficient warranty deed, conveying the premises at Savoy, Massachusetts, described in the deed of Charles Chamberlain to the plaintiffs dated July 18, 1914, to the defendant Charles Chamberlain, free from all incumbrances, and executed and acknowledged by the plaintiffs, the defendants should execute, acknowledge and deliver to the plaintiffs a good and sufficient warranty deed of the premises on Friend Street in Adams, Massachusetts, described in the deed of the plaintiffs dated July 18, 1914, free from all incumbrances, and further should pay to the defendants [plaintiffs] their costs in the sum of $32.28.

The defendants appealed from the final decree.

P. J. Ashe, (*W. S. Morton* with him,) for the defendants.

C. H. Wright, (*W. J. Donovan* with him,) for the plaintiffs.

BRALEY, J. The defendants not having appealed from the interlocutory decree overruling their exceptions and confirming the master's report, the only question on the appeal from the final decree is whether on the record the bill can be maintained.

From the very full findings of the master it is plain, that in the exchange between the parties of the lands in question the plaintiffs, through the false and material representations of the defendant Charles Chamberlain as to the area of the farm as shown by the boundaries pointed out to them by him, which they believed to be true, were induced to part with their own property of greater value. *Worcester* v. *Cook*, 220 Mass. 539. After deeds had been passed and change of occupancy effected, the plaintiffs discovered the fraud, and thereupon, instead of affirming the trade and suing at law for damages, they resorted to equity for rescission and appropriate relief. *Ginn* v. *Almy*, 212 Mass. 486, 493. *Winston* v. *Pittsfield*, 221 Mass. 356, 358.

Nor was it necessary, as the defendants contend, that before bringing suit the plaintiffs should offer to return the property they had received, which included not only the farm, but also some live stock, poultry, farming tools, carriages and harnesses. *Ginn* v. *Almy*, 212 Mass. 486. The filing of the bill was sufficient notice of the election, and, if full restoration could not be made by either party, compensation could be decreed. *Arnold* v. *Maxwell*, 223 Mass. 47. It is therefore of no consequence, that at the time the offer to rescind as alleged in the bill was made, the title was in one Chaliux to whom before they knew of the deception the plaintiffs had conveyed. The title having been held by them under a reconveyance from Chaliux when the bill was filed, and they having offered in the prayer for relief to make such restitution as might be ordered, the only defence urged is untenable.

But it was stated by the parties at the argument, that since the appeal the buildings on the premises conveyed by the plaintiffs have been partially destroyed by fire, and, if the defendants reconvey as ordered by the decree, the plaintiffs would not be revested with their former estate. It is settled that under such circumstances and where strict rescission with specific performance is no longer possible, the bill can be retained for the assessment of

damages. *American Stay Co.* v. *Delaney*, 211 Mass. 229, 233. *Arnold* v. *Maxwell, ubi supra.*

The master having found that the shortage in area consisted of a tract of wood and timber land which he valued at $769.50, the counsel for the plaintiffs stated without any dissent being expressed by the counsel for the defendants, that, if entitled to prevail, they were willing to accept this amount in full satisfaction, and waive all rights to specific relief. The measure of recovery is thus brought within the rule, that in an action for fraud and deceit damages are measured by the difference between the actual value received, and what that value would have been if the representations had been true. *Thomson* v. *Pentecost*, 210 Mass. 223.

The appeal vacated the decree as to the defendants, and under St. 1913, c. 716, § 2, this court, having before it "all the facts necessary for determining the question in dispute," can in conformity therewith direct the entry of a final decree. It follows that the decree appealed from must be amended by striking out after the words "it is ordered, adjudged and decreed," the remaining terms to the words, "and further shall pay to the defendants their costs in the sum of thirty-two dollars and twenty-eight cents," and by inserting in lieu thereof the words, "that the plaintiffs recover of the defendants the sum of seven hundred sixty-nine and fifty one hundredths dollars as damages," and by adding to the closing sentence, "and execution for said damages and costs is to issue." As thus amended the decree is affirmed with costs of the appeal.

Ordered accordingly.

HENRY M. PITT, administrator, *vs.* JENNIE M. BROUTHERS & others.

Berkshire. September 11, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Fraud, As against creditors. *Equity Jurisdiction*, To set aside conveyance in fraud of creditors.

In a suit in equity brought in the name of an administrator for the alleged benefit of the creditors of the plaintiff's intestate to set aside a certain conveyance of

real estate as having been made in fraud of creditors, the trial judge confirmed a finding by a master that the intestate had no actual intention of defrauding his creditors by the conveyance, and refused to confirm a finding of the master that the intestate was insolvent at the time he made the conveyance. It appeared that when the intestate made the conveyance his only debts were for taxes of less than $2,400, which had not yet become payable, and a debt of $6,000 which the conveyance sought to be set aside was made to secure, and that the intestate had life interests in real estate from which he received from $600 to $700 a month and which, estimated by the accepted life tables, were worth at that time more than $50,000. *Held*, that the trial judge was right in finding that the intestate was not insolvent when the conveyance in question was made, and that the facts disclosed no fraud in fact or in law.

BILL IN EQUITY, filed in the Superior Court on April 2, 1915, by the administrator of the estate of William P. Burbank, late of Pittsfield, for the alleged benefit of the creditors of the plaintiff's intestate, alleging that on July 1, 1913, the plaintiff's intestate owned the beneficial interest in a certain farm in Pittsfield, the legal title to which stood in the name of Alfred C. Pitt, also of Pittsfield, and that the plaintiff's intestate, then being insolvent, in fraud of his creditors caused Alfred C. Pitt to convey the farm to the intestate and the defendant, then Jennie M. Burbank, now Jennie M. Brouthers, as tenants by the entirety, whereupon the intestate and the defendant now Jennie M. Brouthers jointly made a mortgage of the farm to Alfred C. Pitt for $6,000; praying that the interest of the intestate in the farm might be conveyed to the plaintiff to apply for the benefit of the creditors of the intestate's estate.

The case was referred to a master, who filed a report containing the findings stated in the opinion.

The case was heard by *Fox*, J., upon the plaintiff's exceptions to the master's report. The judge made an interlocutory decree overruling the plaintiff's exceptions to the master's report and ordering that the master's report be confirmed "except as to the finding that William P. Burbank was insolvent on July 1, 1913."

Later by order of the same judge a final decree was entered ordering that the bill be dismissed with costs to the defendants in the sum of $18.49. The plaintiff appealed.

The case was submitted on briefs.

J. F. Noxon & M. L. Eisner, for the plaintiff.

T. F. Cassidy & P. J. Ashe, for the defendants.

DE COURCY, J. On July 1, 1913, William P. Burbank, the

plaintiff's intestate, owned a life estate in two business blocks in Pittsfield, from which he was receiving a net monthly rental of between $600 and $700. He also had the equitable ownership in a farm worth $16,000, and owed Henry M. Pitt (in whose brother's name the title stood) $6,000 for money advanced to take up three prior mortgages on the farm. No finding was made of the amount of his personal property. His only indebtedness was this $6,000 and the taxes on the city lots for $2,363.40, which would become payable on October 1, 1913.

On said July first Burbank caused the farm to be conveyed to himself and his wife Jennie M. Burbank (now Jennie M. Brouthers) as tenants by the entirety; and they executed a mortgage thereon in favor of Alfred C. Pitt, for $6,000, to secure the above mentioned debt. Burbank was sixty-seven years of age at the time, and in good health. He died on October 17, 1913, without having paid the taxes, and, as his death terminated both his life estate in the city lots and his interest in the farm, his estate became insolvent and was so represented. The remaindermen were compelled to pay the taxes, and have brought this bill in the name of the administrator against Burbank's widow, seeking to set aside the conveyance of the farm as a fraud upon Burbank's creditors.

The master expressly found that "in the transactions of July 1, 1913, Burbank had no actual intention of thereby defrauding his creditors." His further finding that Burbank was insolvent at the time was based on the fact that he was liable for the taxes assessed on April first. But, as stated by the trial judge, in refusing to confirm this finding, "it is plain that the master in casting up Burbank's assets and liabilities failed to take into account his life estate, which was worth at that time, according to the accepted tables more than $50,000." It already appears that this estate was annually yielding him more than $7,000 at the time of the deed complained of; and his only liability was a tax of less than $2,400, not yet demanded or payable. It is not suggested that he intended to contract future debts. The trial judge was right in finding that William P. Burbank was not insolvent on July 1, 1913, when the conveyance of the farm was made. The undisputed facts disclose no fraud in fact or in law, and there was no error in overruling the plaintiff's exceptions and dismissing the bill. *Decree affirmed with costs.*

JOSIAH R. SMITH vs. MIDDLESEX MUTUAL FIRE INSURANCE COMPANY.

Franklin. September 18, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Insurance, Fire: other insurance. *Contract*, Construction.

A provision contained in a policy of fire insurance, that "It is made a condition of this contract that the total insurance permitted, including the amount of this policy, is limited to $7,600," where the policy also contains the provision, that "This policy shall be void if . . . the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company," is an absolute condition, the violation of which prevents a recovery on the policy.

It is the settled law of this Commonwealth that a valid subsequent insurance, made in violation of a limitation or condition in a prior policy, avoids such prior policy.

A contract of fire insurance, made upon property already insured under other policies to the amount of $7,600, which is issued to the insured by an agent of the insurance company with his written permission as the "special agent" of the company, and which bears a "form" or "rider" attached to it signed by the agent "as agent" in the manner provided by St. 1907, c. 576, § 60, cl. 7, containing the words, "Other Insurance Permitted," is a valid contract of insurance upon the property in question creating an excess over $7,600 of all the insurance on the property.

CONTRACT for $784.75 on a policy of fire insurance in the Massachusetts standard form with certain additional clauses as described in the opinion, being the amount of a loss by fire of property covered by the policy on July 28, 1914. Writ dated January 29, 1915.

In the Superior Court the case was submitted to *Callahan*, J., upon an agreed statement of facts, containing the facts which are stated in the opinion. The judge found for the defendant and by his order judgment was entered for the defendant. The plaintiff appealed.

The case was submitted on briefs.

N. P. Avery & A. S. Gaylord, for the plaintiff.

F. W. Brown & W. L. Came, for the defendant.

PIERCE, J. The defendant places its defence on the ground that

the plaintiff, in violation of the terms of the policy upon which he declares, made other insurance upon the same property without the assent in writing or in print of the defendant company.

It is agreed that the defendant's policy was in the Massachusetts standard form prescribed by St. 1907, c. 576, § 60, in the amount of $900, for the term of three years beginning March 8, 1912; that it covered certain property described and apportioned in said policy as follows:

"House	Furniture	Barn	Produce	Tools	Wagons
$375.00	$75.00	$250.00	$75.00	$75.00	$50.00;"

that the policy contained this provision: "This policy shall be void if . . . the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the Company;" and that it also contained this provision: "It is made a condition of this contract that the total insurance permitted, including the amount of this policy, is limited to $7,600.

"In case of other insurance on any of the property mentioned in this policy, whether said other insurance includes the same permissions, hazards, or limits, or whether said other insurance covers in as general a location or not, this Company shall be liable only in the proportion its insurance bears to the whole insurance thereon."

It is agreed that at the time when this policy was issued there were on the property five other fire insurance policies, which with this policy amounted to $7,600; that the property was injured and destroyed by fire on July 28, 1914; "that the defendant had due notice of the loss and that the plaintiff has done all things to entitle him to recover under the terms of his policy, so far as giving notice and furnishing statements required by the terms of the Massachusetts standard policy are concerned."

Before the fire four of the policies expired by limitation of time and were renewed. The fifth policy on expiration was not renewed but a new policy was made in another company covering stock to the amount of $250 in addition to the amount apportioned to the house, barn and produce. The defendant makes no question as to the validity of the renewal policies or as to the substituted policy.

It is further agreed that on March 27, 1912, the plaintiff secured

a policy in the Orient Insurance Company in the Massachusetts standard form of fire insurance policy, for the term of three years, in the amount of $1,200, of which $1,100 covered a portion of the same property described and apportioned as follows:

"House	Furniture	Barn	Wagons	Stock
$400.00	$100.00	$350.00	$250.00	$100.00;"

that one of the printed provisions which was attached to this policy was the following: "E — In case of other insurance on any of the property mentioned in this policy, whether such other insurance is valid or not, or whether it covers the same permissions or hazards or in as general a location or not, this Company shall be liable only in proportion as this insurance bears to the whole insurance thereon;" that at the time when this policy was issued the agent knew that there was prior insurance covering the property and so advised the Orient Insurance Company, and that through inadvertence and oversight the agent neglected to write upon the "form" or "rider" attached to the said policy the words "Other Insurance Permitted," which words the agent thought were printed in said "form" or "rider." It is further agreed that on April 25, 1913, the "special agent" of the Orient Insurance Company, who had general supervision of the company's business in the Massachusetts and Rhode Island territory, gave permission to the agent who issued the policy dated March 27, 1912, to issue to the plaintiff a second Orient policy, which was accordingly issued May 1, 1913, whereby the plaintiff was insured for the term of three years from that date for $1,200, of which $1,100 covered a portion of the same property as follows:

"House	Furniture	Barn	Wagons	Stock
$400.00	$100.00	$350.00	$250.00	$100.00."

On the "form" or "rider" which was signed by the agent and attached to the policy in the manner provided for by St. 1907, c. 576, § 60, cl. 7, were written the words, "Other Insurance Permitted," clause "E," above quoted, was printed thereon and no limitation of the amount of such other insurance was made.

It was further agreed that the agent, in his "daily report" to the home office of the Orient Insurance Company on the last policy, wrote "An additional policy No. 399602" (the first policy), and

attached to the "daily report" the letter of the "special agent" giving permission to issue to the plaintiff a second policy. The agreed facts contain no statement that the defendant assented to the additional insurance in excess of the amount limited at the time when placed. Nor does the plaintiff contend that the defendant ever knew that the excessive insurance had been obtained until after the fire.

As the case is before us on an appeal taken by the plaintiff from the judgment of the Superior Court following a submission to a judge of that court upon the agreed statement of facts, the only question presented is whether upon the agreed facts and the reasonable inferences to be drawn therefrom the finding of the judge of the Superior Court for the defendant was unwarranted as a matter of law. St. 1913, c. 716, § 5. *Boston Lodge Order of Elks* v. *Boston*, 217 Mass. 176, 177.

We are of opinion that the provision in the policy of the defendant that "It is made a condition of this contract that the total insurance permitted, including the amount of this policy, is limited to $7,600," is not merely a representation, the violation of which does not avoid the policy unless there be fraud in the representation or the excess insurance be material to the risk, but is by the precise terms of the contract "a condition" or stipulation to be taken and read with the further provision of the contract that "This policy shall be void if . . . the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the Company." *Conway Tool Co.* v. *Hudson River Ins. Co.* 12 Cush. 144. *Union National Bank of Oshkosh* v. *German Ins. Co. of Freeport*, 71 Fed. Rep. 473.

The second Orient policy of insurance was issued to the plaintiff by an agent of the insurance company with the written permission of the "special agent" of the company. It covered a portion of the same property as did the policy of the defendant. It bore a "form" or "rider" attached to the policy upon which was written and signed by the agent "as agent" in the manner provided by St. 1907, c. 576, § 60, cl. 7, the words, "Other Insurance Permitted," and the amount apportioned to the property covered by the policy of the defendant made the total insurance thereon including the amount covered by the policy of the defendant in excess of $7,600. We are of opinion that the second Orient policy

was a legal and valid contract of insurance; that the agreed facts warranted a finding that it was insurance in excess of $7,600; that it was made without the assent in writing or in print of the defendant, and without the knowledge of the defendant until after the fire. *Canton Co-operative Bank* v. *American Central Ins. Co.* 219 Mass. 132, 136.

It is the settled law of this Commonwealth that valid subsequent insurance avoids a prior policy if made in violation of a limitation or condition of that policy. *Jackson* v. *Massachusetts Mutual Fire Ins. Co.* 23 Pick. 418. *Clark* v. *New England Mutual Fire Ins. Co.* 6 Cush. 342. *Hayes* v. *Milford Mutual Fire Ins. Co.* 170 Mass. 492, 496. *Northern Assurance Co.* v. *Grand View Building Association*, 183 U. S. 308. *Lindley* v. *Union Ins. Co.* 65 Maine, 368.

It becomes unnecessary to determine whether upon the agreed facts the first Orient policy could have been found to have been a legal and valid contract of insurance by reason of the acts and declarations of the agent and special agent of the Orient Insurance Company.

It follows in accordance with the terms of agreement of the parties that judgment shall be entered for the defendant.

So ordered.

JOSEPH R. CHARRON *vs.* HARRY W. DAY, executor.

Franklin. September 18, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Married Woman. Husband and Wife. Physicians and Surgeons. Contract, Implied in fact, Validity.

A married woman may bind her separate estate by an express promise, or by conduct and words from which a promise may be inferred, to pay for necessaries furnished to her while living with her husband.

Where a physician rendered professional services to a married woman living with her husband, made charges to her for his services apparently with her knowledge and gave a credit of $10 on his bill for a load of hay cut from land belonging to her, and where she said to the physician that she would leave property enough to pay his bill and that he would get his pay after her death, in an action brought by the physician against the executor of the will of the woman for his services

up to the time of her death, it can be found that the defendant's testatrix intended the plaintiff to understand that her estate should be bound to pay his charges if they were not paid before her death, and that this would be equivalent to a promise to pay the debt after her death, on which the plaintiff could recover. "A contract to pay money after one's own death is valid." Citing *Earle* v. *Angell*, 157 Mass. 294, 296.

CONTRACT against the executor of the will of Addie L. Day, late of Greenfield, for $1,610.89, alleged to be the balance due upon a running account for medical services rendered to the defendant's executrix up to the time of her death, according to an account annexed. Writ dated May 3, 1916.

In the Superior Court the case was heard by *Aiken*, C. J., without a jury, upon an auditor's report. The material evidence is described in the opinion. The defendant asked the Chief Justice to rule that upon the evidence the plaintiff could not recover. The Chief Justice refused to make this ruling and found for the plaintiff in the sum of $1,543.69. The defendant alleged exceptions.

H. E. Ward, for the defendant.

T. M. Hayes, for the plaintiff.

RUGG, C. J. This is an action by a physician to recover for services rendered to the defendant's testatrix during a period of years extending to the time of her death. She was then a married woman living with her husband, who worked for the support of the family and furnished her the money with which she paid the household bills, including certain cash payments to the plaintiff.

The law implies an obligation on the part of the husband to pay for medical attendance rendered to his wife. But under the present statute the wife also may incur an obligation to pay for such attendance. St. 1910, c. 576, whereby a married woman may be held liable under stated conditions jointly with her husband for debts for necessaries not exceeding $100 in value, has no application to the facts of the case at bar. But a married woman may bind her separate estate to pay for necessaries furnished to her by an express promise or by conduct and words from which an intentional obligation to that effect may be inferred. *Labaree* v. *Colby*, 99 Mass. 559. *Caldwell* v. *Blanchard*, 191 Mass. 489. R. L. c. 153, § 2.

The auditor's findings bearing upon this point are that "No express agreement was made by Mrs. Day to pay Dr. Charron

for his services. . . . Mrs. Day often told Dr. Charron that there would be property enough left by her after her death to pay him and that he would get his pay. . . . All payments made on account of this bill were cash with the exception of one item of credit, which was one load of hay December 5, 1902, $10. Mrs. Day owned the land from which this hay was cut and knew of the transaction. . . . His charges were made against Mrs. . . . Day and whenever payments were made on account of his bill Mrs. Day made them or they were made by her direction," presumably, however, out of money furnished her by her husband. "I do not find that . . . she knew the amount of Dr. Charron's charges against her, nor that she knew that Dr. Charron was charging her for services to other members of the family, nor do I find that there was ever any promise to pay upon her part any bill of Dr. Charron during her lifetime, but that she told the doctor that, if you do not get your money now, you will sometime after my death." The finding was against the plaintiff so far as services rendered to other members of the family are concerned, and no question arises on that point.

The request of the defendant for a ruling that the plaintiff could not recover was denied rightly in view of these findings of fact. The testatrix knew that the attendance was rendered to her and apparently knew that the charges were made against her. One credit upon the account was made seemingly out of her property with her knowledge and consent. The finding that there was no "express agreement" on her part to pay must be considered in connection with the further finding that she said to the doctor that she would leave property enough to pay the bill, and that he would get his pay after her death. The fair implication of these words might reasonably be found to be that she intended him to understand that her estate should be bound to pay his charges, if they were not paid before her decease. If this was so, then it would be equivalent to a direct promise to pay the debt after her death. "A contract to pay money after one's own death is valid." *Earle* v. *Angell,* 157 Mass. 294, 296.

Exceptions overruled.

COMMONWEALTH *vs.* JULIUS GALATTA.

Franklin. September 18, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Landlord and Tenant, Growing crops. *Growing Crops. Emblements. Wanton Destruction of Personal Property. Real and Personal Property. Pleading, Criminal*, Indictment or complaint. *Practice, Criminal*, Motion to quash, Arrest of judgment.

Growing crops, that were planted by a tenant at will in a part of a garden appurtenant to a tenement then occupied by him, continue to belong to him after his tenancy and occupation have been terminated by his landlord giving a lease in writing to a third person of the building containing his tenement.

A lessee under a lease given him to terminate a tenancy at will, who pulls up and throws in a heap growing crops that were planted by the tenant at will, can be found guilty of wantonly destroying the personal property of another upon a complaint under St. 1904, c. 305.

Under the rules of criminal pleading, contained in R. L. c. 218, §§ 17, 37, a complaint under St. 1904, c. 305, for wantonly destroying personal property of another need not allege that the destruction was in a manner and by a means not particularly described or mentioned in R. L. c. 208.

Neither R. L. c. 208, § 105, in regard to trespass in an orchard, nursery, garden or cranberry meadow, nor R. L. c. 208, §106, in regard to maliciously entering an orchard, garden or other improved land of another with intent to carry away, destroy or injure the trees or the products there mentioned, particularly describes or mentions the wanton destruction of growing crops in a garden appurtenant to a tenement by a lessee lawfully in possession of the land.

A motion in the Superior Court to quash for a defect in form a complaint that originally was filed in an inferior court is made too late.

A formal defect in a complaint cannot be taken advantage of by a motion in arrest of judgment.

COMPLAINT, received and sworn to in the District Court of Franklin on July 14, 1916, under St. 1904, c. 305, charging that the defendant, Julius Galatta of Greenfield, on July 14, 1916, at Greenfield, "did wantonly destroy the personal property of another, to wit, the growing crops of George Speleos, by digging them up, and all of the value of $50."

On appeal to the Superior Court the defendant was tried before *Aiken*, C. J. Before the trial the defendant moved to quash the indictment upon the ground that the allegations contained in the complaint set forth no offence under the provisions of St. 1904, c. 305, in that the complaint did not allege that the destruction complained of was in a manner or by a means not particularly

described or mentioned in R. L. c. 208. The Chief Justice denied the motion, and the defendant excepted.

The following facts appeared in evidence: One Constantino Corsiglia was the owner of a two-tenement house numbered 11 on Elm Street in the town of Greenfield with a garden plot adjoining, a part of which had been and was used and occupied by Speleos for garden purposes before the time of the complaint. Speleos occupied the upper tenement in the house and had appropriated a part of the garden plot. On June 29, 1916, Corsiglia executed to the defendant a written lease of the entire premises for the term of one year from July 1, 1916. The defendant notified Speleos to vacate the premises. Other material facts are stated in the opinion.

At the close of the evidence the defendant asked the Chief Justice to rule that upon all the evidence the defendant was entitled to a verdict of not guilty. The Chief Justice refused to make this ruling. He "instructed the jury that as between Speleos (the complainant) and Galatta (the defendant) the growing crops that were in the garden belonged to Speleos as a matter of law, and that Speleos had a right to go upon the premises to cultivate them and to harvest them when they were mature." To this instruction the defendant objected and pointed out to the court that as between Speleos and Galatta Speleos was a tenant at sufferance only, and contended that therefore the rule of law as to growing crops between a landlord and tenant at will did not apply. The Chief Justice refused to change his charge, and the defendant excepted.

The defendant further asked the Chief Justice to rule "that the rule of law as to growing crops between a landlord and tenant applied only to farm property and did not apply to tenement property situate in a city or town." The Chief Justice refused to change his charge, and the defendant excepted.

The jury returned a verdict of guilty. After the jury had returned their verdict of guilty and before sentence was imposed, the defendant made a motion in arrest of judgment upon the same ground as was alleged upon his motion to quash. The Chief Justice denied the motion, and the defendant excepted.

The defendant alleged exceptions.

St. 1904, c. 305, is as follows: "Whoever wantonly destroys or injures the personal property of another in any manner or by

any means not particularly described or mentioned in chapter two hundred and eight of the Revised Laws shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year; but if the value of the property so destroyed or injured is not alleged to exceed fifteen dollars the punishment shall be a fine of not more than fifteen dollars or imprisonment for not more than thirty days."

R. L. c. 208, §§ 105, 106, are as follows:

"Section 105. Whoever wilfully and maliciously enters an orchard, nursery, garden or cranberry meadow, and takes away, mutilates or destroys a tree, shrub or vine or steals, takes and carries away any fruit or flower, without the consent of the owner thereof, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months.

"Section 106. Whoever wilfully and maliciously, and without permission of the owner or person having control thereof, enters upon the orchard, garden or other improved land of another, with intent to cut, take, carry away, destroy or injure the trees, grain, grass, hay, fruit or vegetables there growing or being, shall be punished by imprisonment for not more than six months or by a fine of not more than five hundred dollars; and if the offence is committed on the Lord's day, or in disguise, or secretly in the night time, the imprisonment shall not be less than five days nor the fine less than five dollars.

The case was submitted on briefs.

W. A. Davenport, for the defendant.

J. H. Schoonmaker, District Attorney, for the Commonwealth.

De Courcy, J. George Speleos, a tenant at will of one Corsiglia, during the year 1915 occupied and planted some of the land appurtenant to the premises he hired, without objection on the part of his landlord. Again in April and May, 1916, he laid out and planted some garden produce in the same garden plot. In June, 1916, the landlord executed a lease of the entire premises to the defendant, Galatta, who later notified Speleos to vacate them within two days and brought a writ of ejectment. Thereupon Speleos vacated the premises, moved into the property of an adjoining owner and surrendered the key on July thirteenth. Some time during the early morning of July fourteenth his garden produce was pulled up, destroyed and thrown in a heap on the

premises to which he had moved. The defendant was tried and found guilty on a complaint which charged that he "did wantonly destroy the personal property of another, to wit: the growing crops of George Speleos, by digging them up. . . ."

The motion to direct a verdict of not guilty was denied rightly. At common law growing crops, which owe their annual existence to the cultivation of man, are treated as chattels even while still annexed to the soil. *Penhallow* v. *Dwight*, 7 Mass. 34. See 8 R. C. L. 356. As between the landlord Corsiglia and his tenant Speleos these annual crops were the property of the tenant, and he was entitled to harvest the crop which he planted, even after the landlord had terminated the tenancy at will.

The defendant, Galatta, who took a lease of the premises knowing that Speleos was a tenant at will of his lessor, could not defeat that tenant's right to his crops. The general principle is that where a person is in possession of land under a title that may be determined by an uncertain event not within his control, it is essential to the interests of agriculture that such a determination of his lease shall not prevent him from reaping what he has sown. And we see no reason why a tenant should be denied the right to emblements by the act of the landlord where the crop is raised on a city or town lot rather than on a farm. *Rising* v. *Stannard*, 17 Mass. 282. *Brown* v. *Thurston*, 56 Maine, 126. *Bittinger* v. *Baker*, 29 Penn. St. 66, 70. 41 L. R. A. (N. S.) 404, note.

There was no error in the portion of the charge excepted to. Plainly the tenancy of Speleos was terminated by the lease of the premises to the defendant, and not by the surrender of the keys after the defendant had brought a writ of ejectment and the tenant had moved out. *Chandler* v. *Thurston*, 10 Pick. 205.

The motions to quash and in arrest of judgment were rightly denied. The complaint properly alleged an offence under St. 1904, c. 305. See R. L. c. 218, §§ 17, 37. And neither § 105 nor § 106 of R. L. c. 208 was applicable to the facts in this case.

It may be added that the motion to quash well might have been denied on the ground that it was filed too late, *Commonwealth* v. *Reid*, 175 Mass. 325, and that the alleged formal defect could not be taken advantage of by a motion in arrest of judgment. *Commonwealth* v. *Mackay*, 177 Mass. 345.

Exceptions overruled.

JAMES C. S. TABER, trustee, *vs.* ST. PETER'S PARISH, SPRINGFIELD, & others.

Hampden. September 24, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Devise and Legacy. Will. Evidence.

A testatrix, living in Springfield, provided by her will that, upon the death of a certain life beneficiary, the proceeds of the sale of a certain house should "be given toward the building of an Episcopal Church in the Highlands, which shall be an independent church, not a mission church, as I feel that such a church is much to be desired there." At the time of the death of the beneficiary for life there was an incorporated Episcopal church in the district called the Highlands, which had not been completed when it first was erected and still remained unfinished, and there was not, nor had there been at any time, any Episcopal church building in the Highlands except the one thus described. *Held*, that the church thus described was entitled under the terms of the will to receive the proceeds from the sale of the house.

In a suit in equity by the trustee under a will for instructions, where it appears that by the clear terms of the will the proceeds from the sale of a certain house of the testatrix are given to a certain church corporation, a letter written by the testatrix dated nearly eight years after the date of her will and addressed to the executors of her will but not executed as a codicil, declaring her intention to make a change in her will in regard to the disposition of the proceeds from the sale of the house in question, is not admissible in evidence and cannot be considered by the court.

BILL IN EQUITY, filed, as amended, in the Probate Court for the county of Hampden on April 5, 1916, by the trustee under the will of Lydia T. Conner, late of Springfield, for instructions in regard to the bequest of the proceeds of the sale of the house owned and occupied by the testatrix at 163 Bowdoin Street in Springfield, which is quoted in the opinion.

On appeal to the Supreme Judicial Court the case was heard by *Crosby*, J., who reserved it upon the pleadings, an agreed statement of facts and the further facts found by him, "that the church of the defendant St. Peter's Parish, Springfield, was not completed when first erected and is not now completed," for determination by the full court. The other material facts are stated in the opinion.

It was stated by the single justice in the reservation that the

letter mentioned in the opinion was conceded by the parties to be genuine and was admitted in evidence but that its admissibility was objected to, and that it was to be considered only if determined to be admissible and material.

The case was submitted on briefs.

W. S. Robinson & H. P. Small, for the defendant, Isabella C. Taber.

C. H. Beckwith, for the defendant, St. Peter's Parish, Springfield.

PIERCE, J. This is a bill in equity brought in the Probate Court of Hampden County by the surviving trustee under the will of the late Lydia T. Conner, for instructions as to the disposition of certain property in the hands of the trustee. The defendants are the two residuary legatees under the will and a religious corporation of this Commonwealth. That corporation contends that the property in question should be given to it to carry out the purposes of the testatrix as they are expressed in her will. The two defendant residuary legatees appealed from the decree of the Probate Court to the Supreme Judicial Court, a justice of which heard the case upon an agreed statement of facts and upon evidence offered before him. He, at the request of the parties, reserved the case for the determination of the full court upon the pleadings, an agreed statement of facts and further facts found by him.

The testatrix died on September 25, 1903, leaving a will dated June 15, 1891, and a codicil thereto dated December 28, 1891. The will was allowed on October 21, 1903, and the plaintiff has duly qualified as trustee. William Tillinghast Conner, named in the will as a beneficiary and as a cotrustee, died on January 15, 1914, never having qualified as trustee. The testatrix established a trust to continue during the life of this beneficiary, on whose death the testatrix provided, as to certain real estate, as follows: "The proceeds of the sale of the house now occupied by me, 163 Bowdoin Street, to be given toward the building of an Episcopal Church in the Highlands, which shall be an independent church, not a mission church, as I feel that such a church is much to be desired there."

The testatrix, at the time of the execution of her will and up to the time of her death, had resided at 163 Bowdoin Street in

Springfield. She was a communicant of the Protestant Episcopal Church, and, during her residence in Springfield, had attended Christ Church, somewhat more than a mile from her home, and, during her earlier residence in Springfield, was very active and greatly interested in the work of that church. Later in life her health became impaired to an extent that did not admit of regular attendance at Christ Church.

In 1891 an Episcopal mission chapel was erected in Springfield on the corner of King Street and Merrick Avenue, a locality on the Hill but not in that section thereof known as the Highlands. This chapel was called St. Peter's Chapel, and was so consecrated on June 18, 1892, remaining a mission of Christ Church until April 7, 1893, when an independent parish was organized as St. Peter's Parish of Springfield, one of the defendants. That parish continued to worship in the original chapel building until 1905, when it removed to its present place of worship on Buckingham Street, in the Highlands, land for which was obtained on June 23, 1904. The testatrix occasionally attended church services at St. Peter's both before and after it became an independent church; and the fact of its establishment as a mission of Christ Church, and of its becoming an independent church in 1893, were matters of common knowledge among the members of Christ Church and in the community at large. The value of the house and lot, 163 Bowdoin Street, was about $5,000.

It is the contention of the defendant Taber, that the testatrix had in mind the erection of a church building, that she had no other purpose whatever; that the use of the word "toward" in the phrase "toward the building of" shows "it was intended that the trustee should apply the money toward an object which had a future sense at the time of the application;" that the testatrix had no desire to assist any particular church organization and only to assist in the construction of a church if without such assistance the church would not be built; that a building which complies with the testator's words in the will was completed and in use long before the death of the life tenant, was created without aid of this estate and is not entitled to such aid.

It may be conceded readily that, subject to the use of her son for life and the possibility of his marriage and death leaving issue of the marriage surviving him, the testatrix intended that her

gift "toward the building of an Episcopal Church in the Highlands, which shall be an independent church, not a mission church," should be conditional on the fact that at the time the fund became available for such use there was no church building within the Highland district set apart for the use of an independent Episcopal church.

It also may be granted that it was not her intention that her trustee should apply the fund to relieve the church society from a debt incurred in the building of the church if the building had in fact been built, was a complete structure and was in use for religious services.

But these conditions did not exist when the fund became available for use. The building, though built and in use for more than ten years, was not completed when first erected and has not been completed since. As erected and as it now is the building consists of a nave, in front thereof the first story of a tower, and in front of that a porch. Back of the nave is a chancel of wood and plaster. The nave is of stone, brick, copper and slate with a floor and trusses of wood. It is evident that the chancel is a temporary structure, designed for use only until the society shall be able to erect in its place a substantial and permanent building.

We do not think the will, read in the light of the circumstances, discloses an intention of the testatrix to make her gift conditional on the erection of the entire church building after the death of the life tenant without issue surviving. Manifestly it was her purpose to promote, foster and encourage the building of a substantial and durable church building in her neighborhood, wherein religious services should be held under the ritual of an independent Episcopal church; and that object and purpose would not be satisfied by the erection of a temporary and ephemeral substitute. Upon the agreed facts and the findings of the single justice of this court, we are of opinion that the defendant, St. Peter's Parish, Springfield, comes within the description of the specific charity intended to receive and administer the benefit of the bounty of the testatrix. It is an Episcopal Church in the Highlands; it is an independent and not a mission church; the church building was not completed when first erected in 1904 and 1905 and is not now completed; and there is not now nor has there ever been at any time any Episcopal church building in the district

called the Highlands except the present house of worship of St. Peter's Parish, Springfield.

The letter, conceded to be genuine, dated April 13, 1899, and found among the papers and effects of the testatrix, which reads as follows: "To my Executors William Tillinghast Conner and James C. S. Taber. It is my intention to make a change in my will made June 15, '91 as regards the Clause relative to the sale of the house 163 Bowdoin St., and the giving of the proceeds of said sale toward the building of an Episcopal Church in the Highlands," was not admissible in evidence. It was not a contemporaneous document or paper in existence at the time of the execution of the will, clearly identified and referred to in the will. *Newton* v. *Seaman's Friend Society*, 130 Mass. 91. It was not a codicil to the will executed with the formalities required by law. *Sibley* v. *Maxwell*, 203 Mass. 94. And there is no ambiguity in the face of the will taken in connection with all the surrounding facts. *Best* v. *Berry*, 189 Mass. 510.

It results that the decree of the Probate Court must be affirmed.

Decree accordingly.

JAMES F. CLANCY'S (dependent's) CASE.

Hampden. September 24, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Agency, Existence of relation. *Workmen's Compensation Act.*

Where a city hires from a master teamster horses, a cart and a driver to carry material from one place to another as the officers or servants of the city may direct, the driver being left to deal with the horses in his own way, the driver is not in the employ of the city within the meaning of St. 1913, c. 807, § 6, extending the provisions of the workmen's compensation act to such cities as vote to accept the statute and providing that "this act shall apply to all laborers, workmen and mechanics in the service of . . . a . . . city . . . under any employment or contract of hire, express or implied, oral or written."

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board upon the claim of Harold Clancy as

the alleged dependent of James Francis Clancy, an alleged employee of the city of Springfield, which had accepted the provisions of St. 1913, c. 807. In the decision appealed from the board found and decided that there was no contract of hire, express or implied, oral or written, within the meaning of § 6 of that statute and of St. 1911, c. 751, Part V, § 2, between James Francis Clancy, the deceased employee, and the city of Springfield, and therefore dismissed the claim for compensation.

The case was heard by *Fox*, J. The facts as agreed upon are stated in the opinion. The judge made a decree dismissing the claim in accordance with the decision of the Industrial Accident Board. The alleged dependent appealed.

The case was submitted on briefs.

N. M. Harvey & J. H. Mulcare, for the dependent.

C. H. Beckwith & R. H. Tilton, for the city of Springfield.

RUGG, C. J. The agreed facts show in substance that the deceased as teamster had charge of horses and a cart owned by one McGillicuddy, in whose general employ he was. His duties were to take care of, control and drive the horses and team. It was the custom of McGillicuddy, whenever the team was not otherwise in use, to send his driver with the team to the city yards of the city of Springfield and inquire whether or not there was any carting to be done on that particular day and, if there was any to be done, the driver was told to whom and where to report, and then was given information as to what to get and to what place to take his load; this was the only authority exercised over him by any official of the city. The driver of the team was under no obligation to do any loading or unloading, and the city, its officers, agents or servants gave no direction as to the manner of driving the team and had no power to place any other driver in charge of it. There was no understanding between the city and McGillicuddy as to the length of time that carting should be done by his team and driver, and he was under no obligation to come at any particular time and he could take his team from the work at any time. The only obligation resting on the city was to pay him at the rate of $5.25 per day for whatever work was done. The deceased was not on the pay-roll of the city but was paid by McGillicuddy. While working thus in September, 1915, Clancy received mortal injuries by being thrown to the

ground because the wheel of his cart came in contact with a standpipe in the street. His dependent seeks compensation from the city of Springfield under the workmen's compensation act. The pertinent provision is St. 1913, c. 807, § 6, in these words: "This act shall apply to all laborers, workmen and mechanics in the service of . . . a . . . city . . . under any employment or contract of hire, express or implied, oral or written."

It is plain that there can be no recovery. The deceased had no contract of any kind with the city. His contract of employment was exclusively with McGillicuddy, who alone was responsible for his wages. This is the plain case where the city hired from another horses, cart and driver to carry material from one place to another as its servants or officers might direct, the driver being left to deal with the horses in his own way. As was said in *Peach* v. *Bruno*, 224 Mass. 447, nothing is better settled under such circumstances, when nothing more appears, than that as matter of law the driver is the servant of the owner of the horses and not of the one who hires them. *Shepard* v. *Jacobs*, 204 Mass. 110. *Tornroos* v. *R. H. White Co.* 220 Mass. 336. *W. S. Quinby Co.* v. *Estey*, 221 Mass. 56. This principle of law applies as well to claims arising under the workmen's compensation act as in other branches of the law. *Pigeon's Case*, 216 Mass. 51. The case at bar is well within the authority of the first point decided in *Comerford's Case*, 224 Mass. 571. The decision of the Industrial Accident Board was right.

Decree affirmed.

STUART M. ROBSON, administrator with the will annexed, *vs.* EDWIN F. LYFORD, executor.

Hampden. September 25, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Evidence, Of survival, Circumstantial, Remoteness, Competency, Opinion.

In an action of contract against an executor by the administrator with the will annexed of the alleged widow of the defendant's testator for the amount of certain legacies bequeathed to her as such widow, it appeared that the husband

and wife when seated in the tonneau of a limousine motor car were killed by a collision with a steam railroad train running at great speed, and the defendant contended that the plaintiff's testatrix never became entitled to the legacies because she did not survive her husband. It appeared that the husband was eighty and the wife seventy-three years of age and that at the time of the accident the general condition of health of the wife was much better than that of her husband, that they were sitting at some distance apart on the rear seat, each in the respective corner, the husband at the extreme right and the wife at the extreme left hand side of the motor car, that the motor car first was struck by the engine of the train on its rear right hand wheel, that the right hand side of the car was crushed, that the left hand side was comparatively uninjured and that the chauffeur, who was driving on the left hand side, was injured only slightly by being thrown out, and there was evidence on which it could have been found that, while the husband was killed instantly by the engine, the death of the wife was not caused by contact with the engine but was caused after the collision by having the top of her skull cut off by some part of the motor car when she was thrown to the ground. *Held*, that there was evidence for the jury that the plaintiff's testatrix survived her husband and became entitled to the legacies.

In the same case the chauffeur who was operating the car at the time of the accident was a witness at the trial. He testified, subject to the defendant's exception, that when they were at a certain point on the road, which was two miles in distance and ten minutes in time from the place and time of the collision, the husband sat "kind of right around sideways, in the rounding part of the car," that the wife sat "at the extreme edge of the seat on her side, at the extreme end" and that there was quite a space between them along the width of the rear seat. *Held*, that, considered in the light of connecting evidence, this testimony of the chauffeur was not too remote as matter of law, was material evidence and was admitted rightly.

In the same case, the presiding judge had asked a physician, who was testifying as a witness, "Would the difference, if any, in their vigor of health or the lack of it cut any figure in determining in your professional opinion as to whether either survived the other, in view of their injuries as you saw their bodies respectively?" The witness answered, "Yes, sir." This question and answer were not objected to. Afterwards another physician, subject to the defendant's exception, was allowed to testify that immediately before the day of the accident the wife was in a better condition of health than her husband. *Held*, that the evidence was competent upon the issue of survival; but that, if it was immaterial, the defendant, in the light of the other evidence on the question of survival, was not harmed by it within the meaning of St. 1913, c. 716, § 1.

CONTRACT by an administrator with the will annexed of the estate of Elizabeth T. Porter, alleged to have been the widow of Sherman D. Porter, against the executor of the will of Sherman D. Porter, to recover the amount of the legacies bequeathed to the plaintiff's testatrix by the will of the defendant's testator. Writ dated September 19, 1914.

The clause of the will of Sherman D. Porter under which the

legacies were claimed was as follows: "First. To my wife, Elizabeth T. Porter, I give and bequeath the sum of Fifty Thousand ($50,000) Dollars, also all my household furniture, furnishings, books, pictures, watches, jewelry, ornaments, clothing and all my household goods, and personal property about my homestead, also all my robes, blankets, automobile and other articles of personal property about my barn, not including in this bequest and gift, however, any cash, stocks, bonds, notes, choses in action, or similar property, except said sum of Fifty Thousand ($50,000) Dollars, not including my clock in the hall of my house."

The defendant's amended answer denied that the plaintiff's testatrix survived the defendant's testator or ever became his widow.

In the Superior Court the case was tried before *King*, J. The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to rule that on the pleadings and on the evidence the plaintiff could not recover. The judge refused to make this ruling, and submitted the case to the jury, concluding his charge as follows:

"If Mrs. Porter survived him [her husband] by the minutest fraction of time that is conceivable, that is sufficient time for that legacy to vest in her; and if it vested in her and she then, or immediately thereafter, died, it passes under her will. And it is upon that theory that this suit is brought. . . .

"Then the whole controversy before you, gentlemen, is which of these two, husband or wife, survived the other, if either did survive? But you cannot find a verdict for the plaintiff, whatever your wish may be in the matter, unless you are satisfied upon all the evidence that she survived her husband by some fraction of time however small.

"If you are satisfied upon all the evidence before you, taking into account the spoken word of every witness, taking into account not only what the persons said upon the witness stand but how they said it, taking into account the probabilities or improbabilities of what they said, taking into account every fair inference which you may draw from that testimony, — if you can say . . . that upon that you are satisfied that she survived, she, Mrs. Porter, survived her husband by the minutest fraction of time, that is sufficient, and the plaintiff is entitled to the sum I have

specified. If you cannot say that, that is not sufficient, and your verdict must be for the defendant."

The jury returned a verdict for the plaintiff in the sum of $55,901.50; and the defendant alleged exceptions, as explained in the opinion.

C. H. Beckwith (*R. H. Tilton* with him,) for the defendant.

W. H. McClintock, (*D. B. Hoar* with him,) for the plaintiff.

PIERCE, J. This is an action of contract brought under R. L. c. 141, § 19, by the administrator *de bonis non cum testamento annexo* of the estate of Elizabeth T. Porter against the executor of the will of Sherman D. Porter, to recover a pecuniary legacy of $50,000 and a specific legacy of personal property of the agreed value of $2,238.75.

The sole question of fact in the case is, Did Mrs. Porter survive Mr. Porter? The presiding judge submitted this question of fact to the jury against the defendant's request for a ruling that a verdict should be ordered for the defendant.

The case is brought before this court on the defendant's exception to the refusal to rule that a verdict should be ordered for the defendant and upon exceptions taken to the admission of certain testimony of Fred W. Bennett and of that of Dr. George S. Stebbins. All other exceptions taken at the trial were waived at the hearing before the full court.

The material facts upon the testimony which could have been found by the jury are as follows:

Sherman D. Porter and Elizabeth T. Porter, his wife, lost their lives on August 26, 1913, in a common disaster consisting of a collision between a Knox limousine automobile in which they were driving and a train on the Boston and Maine Railroad at Bryant's Crossing in South Deerfield, Massachusetts. The train was an express passenger train going south toward Springfield on the west or south bound track, there being two tracks at the point of the accident. The automobile was coming south on the highway which runs practically parallel to the Boston and Maine Railroad tracks from South Deerfield Centre to a point a little north of Bryant's Crossing where it turns and crosses the railroad tracks at an angle of about twenty-five degrees.

Mr. and Mrs. Porter had left Greenfield for Springfield some time between two and two-thirty o'clock in the afternoon. They

both sat on the rear seat of the limousine in the tonneau, Mr. Porter in the right hand corner and Mrs. Porter in the left, with quite a space between them. At the South Deerfield Post Office, which is from one quarter to one third of a mile north of the point of the collision, Mr. Porter's chauffeur, Bennett, noticed Mr. Porter sitting back in the right hand corner of the seat, slouched down somewhat, his head turned slightly to the left and resting against the rear right hand corner. About seventy paces north of the point of the collision the Porter limousine passed one Melendy, who was going south on the highway in a carriage. Melendy testified that after the Porter automobile passed him he saw Mrs. Porter lean forward as if to touch the chauffeur and immediately resume her former position in the left hand corner of the seat. The Porter automobile was going in the same direction as the Melendy carriage and passed the latter on Melendy's right, the wrong side of the road. Mrs. Porter was sitting in the corner nearest Melendy, that is, the left hand corner of the automobile, and was certainly back in her seat at the moment of the collision. Melendy saw the collision and testified that the train struck the automobile on the rear right wheel or immediately behind it.

The collision was also seen by one Mann, who testified that the engine struck the automobile about the rear of the right hand side, the impact being between the corner and the rear wheel on the right hand side, that is between the extreme corner and the wheel, directly back of the rear right wheel.

Melendy and Mann were the only eyewitnesses of the collision who undertook to testify as to the point of the impact.

The speed of the train at the moment of the collision was approximately fifty miles an hour and that of the automobile from twelve to fifteen miles per hour.

Mr. and Mrs. Porter were carried down the track approximately two hundred and fifty to two hundred and seventy-five feet before being deposited on the ground on the westerly side of the south bound track. Various persons went down the track to where Mr. and Mrs. Porter were, the earliest arriving at the spot not less than a minute after the collision. No sign of life was then observed in either Mr. or Mrs. Porter.

Bennett, the chauffeur, who at the moment of the collision was sitting in the driver's seat on the left hand side of the automobile,

directly in front of Mrs. Porter, was found about twenty to thirty feet south of Mr. and Mrs. Porter only slightly injured and has since recovered. Various parts of the automobile were deposited along the ground on the westerly side of the south bound track, a small part of it being south, but most of it north of the bodies. None of the parts of the automobile were found east of the south bound track, except a spare tire which, before the collision, rested in a tire carrier fastened to the rear of the automobile. Mrs. Porter's hat was found on the easterly side of the south bound track at a point about opposite, or slightly south of the point where the bodies of Mr. and Mrs. Porter lay, and when found had a switch of artificial hair attached to it and both the hair and the hat were clean and in good condition. Near her body were also found a lady's handbag, which was open, and a purse, lady's watch and side comb and a few coins.

Mr. Porter's body lay about ten feet west of the westerly or south bound track, and not quite at right angles to it. Mrs. Porter's body was close to Mr. Porter's, her feet being about four feet to the left of Mr. Porter's feet and her head toward the highway and about ten feet from his head. Neither body had the appearance of having been rolled upon the ground.

The back of Mr. Porter's head was crushed in from a point near the top of the head to the base of the skull, and the skull was a pulpy mass, the bone being broken into small pieces and the brain oozing from it. The medulla oblongata was badly crushed and the floor of the skull was all broken. The right collar bone was broken, both legs were broken above the ankle, the bone of the left leg protruding through the flesh, the left arm was broken, the ribs were crushed in, those on the right side more than those on the left, and the sternum crushed in and flattened. Mr. Porter's body was much more limp than that of Mrs. Porter.

Mrs. Porter's skull was cut off almost horizontally at a point about level with or just over the eyes, the cut extending around on both sides above the top of the ears and on the same level continued clear around the skull. The cut was described as being about as clean a cut as would be made at an autopsy. The top of the skull, although cut off, was not completely severed from the head but remained attached to it by a hinge of scalp in the middle of the back of the head. The top of the skull so cut off

did not rest upon the part from which it was cut, but was opened back like the top or cover upon an open box. Nearly, if not quite all of Mrs. Porter's brains were out of her skull so that the floor or base of the skull was exposed to view. About eighteen inches to two feet directly behind her head, her brains, about a quart in quantity, were found in a puddle. Both her arms were broken at the wrists. One Hackley, an undertaker who removed the bodies from the side of the track, scooped up Mrs. Porter's brains and put them into her skull and replaced the top of the skull without severing it from the remainder. The bodies were taken to Springfield on the day of the accident.

When Mr. Porter's body was examined at Springfield, the whole top of the head had fallen in, the brains had run out and the cranium had been cleaned of all its contents. The skull had been broken into very fine pieces, "too fine to be of any use," as the undertaker described it. The pieces of the skull had fallen out, some into the transportation case and some were clinging to the body. The scalp had dropped into the cavity of the head. The skull was broken over to the centre of the forehead from the top of the neck in the rear. The medulla was gone, and the bony structure surrounding the foramen magnum (the opening in the back part of the base of the skull through which the spinal cord passes) was shattered so that the bones had dropped away and were unrecognizable.

When Mrs. Porter's body was examined at Springfield it was found that her skull was entirely devoid of contents and that the top of the skull had been severed from the rest of it.

On the afternoon of the accident, before the wreckage was removed, two photographs were taken by a newspaper reporter and were introduced in evidence.

The wreckage of the automobile was removed to Springfield and was there stored in a barn on Elliott Street where it was at the time of the trial in substantially the same condition as immediately after the accident. The jury had a view of all the wreckage and certain parts of it were introduced in evidence at the trial and also exhibited to this court. An inspection thereof disclosed that the rear right hand corner of the automobile, in which Mr. Porter was sitting, that is, that part starting at a point just back of the rear right hand tonneau door and extending back

beyond the rear right hand corner where the back board or sill of the rear seat connects (on the right) with the corner in the rear, was broken into such small pieces that it could not be identified. The same was true of the back of the car from the chassis frame to the top with the exception of two parts, namely, the left rear corner and part of the sill under the rear window, being of the same level at the back as the sill under the left side window of the limousine. The right rear corner of the top was gouged out and was missing, leaving an irregular splintered boundary to the other part. The missing part was that extending from the rear right hand corner of the top almost to the middle line of the top drawn lengthwise and from the back toward the front corner a distance of between four and five feet. The rest of the top was intact except that it was somewhat cracked.

Both of the right hand wheels of the automobile were broken, the right rear wheel being the most damaged of all four wheels. The tire on the right rear wheel and on the right front wheel were both broken but the tires on the left side wheels were not broken and at the trial were still inflated with the air that was in them on the day of the accident, as was also the spare tire carried in the rear of the automobile, which was found on the east side of the tracks comparatively uninjured, having probably been wrenched loose at the first instant of the impact. The rear end of the rear right hand mudguard was bent down and buckled up and there was a mark, evidently of a hexagonal nut or bolthead, imprinted on it. The rear channel bar or crossbar of the chassis frame was broken at a point eleven inches to the left of the rear right corner and at the point of fracture there was a heavy dent from the outside to the middle, running from the rear toward the front. This channel bar is between thirty-five and thirty-six inches in length. The tire carriers which were fastened to the rear of the car were easily recognizable, the left hand one being in very good condition, but the right hand one bent inward.

The left hand rear side and corner, in which Mrs. Porter was sitting, is one of the largest pieces. This left rear piece consisting of wood and aluminum extended from the left side of the rear window around to the left rear door and still retains its identity. When the photograph Exhibit 7 was taken, a part of the sill under the rear window was apparently still attached to the left

rear side of the limousine. This part spans more than half the distance across the back starting from the left hand side. This part of the sill would be behind a person sitting in the left rear corner, where Mrs. Porter was sitting when last seen. When brought into court, however, it had in some manner become detached from the left rear corner.

After the collision, the right hand side of the pilot of the locomotive was found to be bent down and to the left. It was bent in on the right hand side and some of the spokes on the right of the centre of the pilot were broken, and the lower right hand double step (two steps cast in one piece) was almost ripped off, being left hanging by one bolt. There was a large quantity of crushed or broken glass on the front right side of the locomotive and the tops of two bolts of the right hand cross-head arm had been sheared off. The left hand side of the locomotive was uninjured.

Mr. Porter was eighty years old, was about six feet in height and weighed over two hundred and fifty pounds, and Mrs. Porter was seventy-three years old and weighed about one hundred and thirty-five pounds and was about five feet five inches to five feet six inches in height. Mr. Porter before the accident had been suffering from chronic bronchitis and arteriosclerosis and from high blood pressure. He had a chronic enlarged prostate gland which had required irrigation of the bladder for some years back. Mrs. Porter, about a year before the accident, had had a slight numbness in her side for three or four days, not, however, enough to keep her from walking about the house and attending to her duties. She complained somewhat of indigestion, but not of acute indigestion. Her general condition of health was much better than that of Mr. Porter. The evidence was conflicting on the question whether there was any human hair or tissue found upon any part of the locomotive after the accident, but the jury could have found there was none on the testimony of the engineer Pecord.

The testimony of the chauffeur, Bennett, that when they resumed their journey, after a delay of fifteen minutes at the roadside in South Deerfield at a point a mile and three fourths or two thirds north of the South Deerfield Post Office and two miles in distance and ten minutes in time measured by the rate of speed

of the automobile from the point of collision, Mr. Porter sat "kind of right around sideways, in the rounding part of the car, partly against the side and partly against the back, against the curve of the car, mainly against the curve of the car," and that Mrs. Porter sat "at the extreme edge of the seat on her side, at the extreme end" and that there was quite a space between Mr. and Mrs. Porter along the width of the rear seat, was not too remote as a matter of law. And when considered in connection with the testimony as to the position in the car taken by them from the time the car left Greenfield until the car stopped by the roadway in South Deerfield, in connection with the position occupied by Mr. Porter at the South Deerfield Post Office, as also their relative positions as seen by Melendy seventy paces north of the crossing and by Cunningham one hundred and fifty feet north of the crossing, together with the probability, as the jury could find, that persons of their age and somewhat impaired physical vigor would be likely to avail themselves of the support afforded by the sides and back of the car, was material, and therefore rightly submitted to the jury in support of the contention of the plaintiff that at the moment of the collision Mr. and Mrs. Porter respectively sat at the extreme right and left hand side of the rear seat of the automobile.

The testimony of Dr. Stebbins that immediately before August 26, 1913, Mrs. Porter was in better condition of health than Mr. Porter was, manifestly was offered and admitted in consequence of the answer "Yes, sir" of Dr. Twitchell to the question of the presiding judge, "Would the difference, if any, in their vigor of health or the lack of it cut any figure in determining in your professional opinion as to whether either survived the other, in view of their injuries as you saw their bodies respectively?" It is to be observed that the question to Dr. Twitchell and his answer were put and received without objection. We think the evidence was competent to meet the possible, the in fact actual, contention of the defendant that husband and wife came to simultaneous and instantaneous death as the result of the same form of violence inflicted upon each of them at the same point of time. We are also of opinion that the defendant was not harmed by the admission of the testimony if the evidence was immaterial. St. 1913, c. 716, § 1.

Upon all the evidence the jury would be warranted in finding that the locomotive struck the automobile at the rear of the right hand wheel; that the force of the impact crushed the side of the right side of the car, and the head of Mr. Porter in such a manner that his death was instantaneous; that following the impact the automobile took up the velocity of the train at a point and time sufficiently early to prevent its being injured any more than it was, and that Mrs. Porter's body and Bennett's body, which were inside the car, took up the same velocity at the same time. It would be warranted in finding that the automobile and the bodies of the inmates of the car were carried down the track two hundred and fifty to two hundred and seventy-five feet and then dropped to the ground. It would be warranted in finding that Mrs. Porter did not receive her mortal wound while within the car from the evidence as to her position therein at the moment of collision, in connection with the evidence to be inferred from the comparatively uninjured condition of the left side of the car and the escape of Bennett with slight injuries. It would be warranted in finding that the top of the skull of Mrs. Porter was cut off by some part of the automobile and not by contact with the engine by the nature of the cleavage. It would be warranted in finding that the skull was not cut off before Mrs. Porter was thrown to the ground by the testimony, if believed, that "the brain would be spilled immediately upon the taking off of the dome of the skull." It would finally be warranted in finding that the injury to the skull occurred when she was dropped or thrown from the train by the testimony, if believed, that in that event, the brains would be found, as they were, "within a few feet of the point of the accident, of where she fell."

Without further analysis of the long record it is plain that there was evidence of a substantial character to support the position of the plaintiff.

Exceptions overruled.

CHRISTIAN A. WINDT *vs.* SYLVESTER Z. POLI.

Worcester. October 1, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, In maintenance of real estate.

If the owner of a building employs a tinner and roofer to repair the roof of the building, the only access to which is by means of a ladder leading to a skylight, and this ladder belongs to a tenant in the building and is defective, and if, when the roofer was employed, he was told by the agent of the owner of the building that it was not necessary for him to bring his ladder and that he could "use the ladder up there," and if, while the roofer is ascending the ladder to get to the roof, the ladder breaks and the roofer is injured, in an action brought by him against the owner of the building for his injuries, it is for the jury to determine whether the defendant performed his duty of furnishing the plaintiff with a reasonably safe ladder to reach his place of work and whether by the exercise of reasonable diligence the defendant could have ascertained the defective condition of the ladder.

TORT by a tinsmith and roofer for personal injuries received on April 8, 1915, by reason of the breaking of a defective ladder, furnishing the only means of access to the roof of a building of the defendant numbered 34 on Front Street in Worcester, which roof the defendant had employed the plaintiff to repair. Writ dated July 9, 1915.

In the Superior Court the case was tried before *White*, J. The plaintiff in his testimony described the accident as follows: "I have been in the tinsmith and roofing business for sixteen years. I went to the defendant's building at the request of Tom Cunningham to repair the roof. I had worked on the building three times previously at the request of Mr. Cunningham and had always received pay for my work from Mr. Poli, each time going on to the roof in the same way. When I arrived at the building I went to the top floor and found a ladder standing there extending up into the skylight or scuttle. I sent a man ahead of me to open the scuttle cover. I then went down to get a broom. When I came up I had three brooms in my right hand and held

on to the ladder with my left hand and I was in a hurry and went up, and when at the middle of the ladder, the left side broke and I swung around and fell down, I didn't get up to the top and then I hit my left side and that is all." The plaintiff also testified, "The ladder when it broke one side it started to slide down and of course I followed it and I hit my back and didn't know anything." He also testified, "I saw Tom Cunningham and I asked him if I would take my own ladder and he said, 'No, that is not necessary; you may use the ladder up there.'" Other evidence showed that Cunningham was the janitor of the building and was employed by the defendant to have charge of it. There was evidence that the ladder was defective and that it belonged to a tenant of the defendant.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant, and at the request of the plaintiff reported the case for determination by this court, with the stipulation that, if the ordering of the verdict was right, judgment was to be entered for the defendant on the verdict; and that, if the case ought to have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of $2,500.

The case was submitted on briefs.

C. H. L. Bock, for the plaintiff.

C. M. Thayer, F. C. Smith & G. A. Gaskill, for the defendant.

BRALEY, J. The jury would have been warranted in finding on the evidence introduced by the plaintiff, that the ladder, the breaking of which caused his injuries, was the only means of access to the roof which the defendant had engaged the plaintiff to repair, and that by direction of the defendant's agent in charge of the premises and of the repairs the plaintiff used the ladder which had become so weakened and defective as to be unsafe and dangerous, a condition not obvious but ascertainable on inspection. *Boccella* v. *Holt-Fairchild Co.* 217 Mass. 161, 162.

It would follow from these findings that, having undertaken to provide the plaintiff with an appliance for the performance of the work, without the use of which the repairs could not be made, the defendant was bound to furnish a reasonably safe ladder; and it was for the jury to determine whether this duty had been discharged, or whether by the exercise of reasonable diligence the

defect could have been ascertained and remedied. *Blohm* v. *Boston Elevated Railway*, 221 Mass. 390, 392, 393.

In accordance with the terms of the report the plaintiff is to have judgment in the sum of $2,500.

So ordered.

SEBASTIAN UZZIO'S (dependent's) CASE.

Worcester. October 1, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Workmen's Compensation Act. Evidence, Circumstantial.

In a claim under the workmen's compensation act the Industrial Accident Board may be warranted in finding that an employee's death resulted from an injury arising out of and in the course of his employment on evidence that is wholly circumstantial.

In a claim under the workmen's compensation act by the dependent widow of a deceased workman employed in a mill, it appeared that the employee was thirty-seven years of age and in good health, that the day before his death he was engaged in shovelling coal from one of two cars which stood on the high end of a trestle thirty-six and a half feet above the ground, that on the day of his death he left home for his work soon after six o'clock in the morning, having on his working clothes and leather mittens and having told his wife that he had to shovel coal that day, that, after a short stay in the boiler room of the mill, he started in the direction of the coal cars in time to reach them before ten minutes to seven, the time for beginning work at the mill, that the coal cars were reached by walking on two six inch planks which ran along the outer edge of the trestle and were not guarded by any fence or rail, that on that morning, which was a very cold one, they were covered with frost, that about six minutes before seven o'clock a fellow workman arrived at the coal cars and saw footprints in the frost on the planks as far as the ladder that was used to get into one of the coal cars, that in the coal car next to the ladder was found one of the mittens of the employee, and that about seven o'clock the employee was found on the ground unconscious directly underneath the ladder with a mitten on his right hand and nothing on his left hand, that his skull was fractured, that he died without recovering consciousness, and that no autopsy was performed because the attending physician and the medical examiner regarded it as apparent that his death was caused by the fall and not by apoplexy or anything else. *Held*, that a finding of the Industrial Accident Board was warranted that the death of the employee resulted from an injury arising out of and in the course of his employment.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the

Industrial Accident Board, awarding compensation to Dominica Uzzio, the dependent widow of Sebastian Uzzio, who at the time of his death was in the employ of the American Woolen Company in the part of Fitchburg called West Fitchburg.

The case was heard by *Sanderson*, J. The evidence is described in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board awarding to Dominica Uzzio as the dependent widow of Sebastian Uzzio a weekly payment of $6.17 for a period of five hundred weeks from December 23, 1915, which was the date of the injury and death of the employee. The insurer appealed.

The case was submitted on briefs.

C. C. Milton & F. L. Riley, for the insurer.

P. F. Ward, for the dependent widow.

DE COURCY, J. The finding of the Industrial Accident Board was that the death of the employee on December 23, 1915, resulted from an injury arising out of and in the course of his employment. As in the analogous case of the verdict of a jury or the finding by a judge in an action at law, that finding is conclusive if it has a substantial support in the evidence; and the conclusion may be reached not only by direct evidence of facts but by reasonable inferences from them. *Diaz's Case*, 217 Mass. 36. *Von Ette's Case*, 223 Mass. 56.

There was uncontradicted testimony of the following facts: Uzzio, a man thirty-seven years of age, was a laborer in the employ of the insured, the American Woolen Company. On the day before the accident he was engaged in shovelling coal from one of two cars which stood on the high end of a trestle, thirty-six feet and six inches above the ground. The cars were located two hundred feet from the beginning of the trestle. They were reached by walking on two six inch planks, which ran along the outer edge of the trestle and were not guarded by any fence or rail. On the morning of the accident the employee left home for his work soon after six o'clock, having told his wife that he had to shovel coal that day. He had on his working clothes, and wore leather mittens. He made no complaint that he was not in his usual good health. After a short stay in the boiler room of the mill, he started in the direction of the coal cars in time to reach them shortly before ten minutes to seven, the time when work was started at the mills.

At about six minutes before seven one Anderson, who worked with Uzzio, arrived at the coal cars. It was a very cold morning. He found the planks covered with frost, and saw footprints thereon as far as the ladder which was used to get into the coal car. He knew that railroad employees never came to the trestle to do any shifting before nine or ten o'clock. A left hand mitten, which on the evidence belonged to Uzzio, was found in the corner of the car next to the ladder. About seven o'clock Uzzio was discovered unconscious on the ground directly underneath the ladder and where he naturally would be if he had fallen from the trestle more than thirty-six feet above. There was a mitten on his right hand and nothing on his left. His skull was fractured and the injuries found on him were such as could have been caused by a fall from the trestle. No autopsy was performed for the reason that the attending physician and the medical examiner did not deem it necessary, but regarded it as apparent that the death of the employee was caused by the fall and not by apoplexy or anything else.

Without reciting the evidence in further detail it seems apparent that the board reasonably could infer from the facts proved by direct or circumstantial evidence that the employee fell from the frost covered and unguarded trestle to the ground thirty-six feet below, and thereby sustained fatal injuries. We cannot say that such a conclusion is based upon mere surmise or speculation; it is supported by logical reasoning from established facts. *Davis* v. *Boston Elevated Railway*, 222 Mass. 475, 479, and cases cited. It was not necessary for the dependent to exclude the possibility that her husband's death might have been due to an apoplectic shock, as suggested by the insurer, but only to satisfy the board by a fair preponderance of the evidence that it was due to a fall from the trestle. Such an external accident is indicated by all the facts, and supported by the age and the physical condition of the employee when last seen a few minutes before he was found under the trestle. *Woodall* v. *Boston Elevated Railway*, 192 Mass. 308, 312.

The board were well warranted in finding that the employee met with his injury in the course of his employment. It occurred at the time and place of his occupation, and while he was engaged in the duties incidental to it. The evidence also warranted their conclusion that the injury arose out of his employment. If his fall was due to the slippery, unguarded and dangerous condition of the

trestle and ladder, then his injury was caused by a risk incident to the work he was employed to do. *McNicol's Case*, 215 Mass. 497. *Sundine's Case*, 218 Mass. 1. *Von Ette's Case, ubi supra.* The facts in the case at bar distinguish it from *Sanderson's Case*, 224 Mass. 558. What has been said disposes of all matters in controversy.

Decree affirmed.

RAYMOND GAGNON'S CASE.

Worcester. October 1, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Workmen's Compensation Act. Evidence, Appearance of witness. *Words*, "Wages."

Under St. 1915, c. 236, providing that, "Whenever an employee is injured under circumstances that would entitle him to compensation under the provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven, and acts in amendment thereof and in addition thereto, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, his wages would be expected to increase, that fact may be taken into consideration in determining his weekly wages," the word "wages" means the wages earned in the particular employment out of which the injury arose.

Under St. 1915, c. 236, it is proper for an arbitration committee and the Industrial Accident Board to consider the personal appearance of the injured employee upon the witness stand in passing upon the question whether his seeming intelligence, health and aptitude for the work in which he was employed would have been likely to receive recognition by an increase of his wages by his employer if the injury had not been received.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board in regard to the construction of St. 1915, c. 236, in passing upon the claim to compensation of Raymond Gagnon, who at the time of his injury on June 8, 1916, was in the employ of the Stoddard Rubber Company at Millbury.

The case was heard by *O'Connell*, J. The report of the Industrial Accident Board stated that the board made, with two other

rulings likewise requested, the following rulings requested by the employee:

"3. In determining 'weekly wages' under St. 1915, c. 236, the committee of arbitration is not limited to the probable increase in the same industry in which the employee was working at the time of the accident.

"4. In determining 'weekly wages' under St. 1915, c. 236, the committee of arbitration is not limited to the probable increase in the particular company for which the employee was working at the time of his injury.

"5. In determining 'weekly wages' under St. 1915, c. 236, the committee of arbitration is entitled to consider the personal appearance of the injured employee, his age and experience, his physical strength, his mental ability, his character, his family conditions, his station in life, his plans for the future if the accident had not occurred; that is, the committee is entitled to take into account every fact and condition which appears as to the personality of the injured employee himself, and as to all of his prospects in the future under the natural conditions confronting him before the accident in determining what his probable average wages would be under such conditions for the period of time covered by the act."

The report also stated that the board refused, with other rulings likewise requested, to make the following ruling requested by the insurer:

"2. In determining weekly wages, under St. 1915, c. 236, the committee of arbitration is entitled to consider the probable natural increase in the wages of the injured party in the same employment in which he was engaged when injured, and cannot take into consideration the possible conjectural increase in wages which might be earned in the future by the injured employee in any possible conjectural position, employment or station in life."

St. 1915, c. 236, is entitled "An Act relative to compensation to young and inexperienced workmen who receive injuries." All the material portion of the act is quoted in full in the opinion.

The report of the Industrial Accident Board was filed on March 31, 1917. The employee, Raymond Gagnon, testified before the board that he was eighteen years old. The board found "that the average weekly wages of the employee, Raymond Gagnon, under

St. 1915, c. 236, and the general provisions of the workmen's compensation act, had it not been for the occurrence of the injury, would have been $12 a week at the end of one year from the date of the injury, that is, June 8, 1917; and that on June 8, 1918, he would have been able to earn an average weekly wage of $20."

The judge made a decree in accordance with the decision of the Industrial Accident Board ordering that the insurer should pay to Raymond Gagnon "the total sum of $2,095.21, with interest thereon, according to law." The insurer appealed.

The case was submitted on briefs.

A. H. Bullock, J. M. Thayer & E. C. Thayer, for the insurer.

M. M. Taylor & M. C. Taylor, for the employee.

RUGG, C. J. This case involves the construction of St. 1915, c. 236. It is in these words: "Whenever an employee is injured under circumstances that would entitle him to compensation under the provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven, and acts in amendment thereof and in addition thereto, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, his wages would be expected to increase, that fact may be taken into consideration in determining his weekly wages." The purpose of the workmen's compensation act was to substitute, as between employee and employer in the cases to which it is applicable, for common law or statutory rights of action and grounds of liability, a system of money payments based upon the loss of wages. It was stated in the Report of the Massachusetts Commission on Compensation for Industrial Accidents, at page 46, in submitting to the Legislature in 1912 a commentary on the workmen's compensation act, that "The basic principle of the act is that the cost of the injuries incidental to modern industry should be treated as a part of the cost of production. The act was framed with that end in view." Doubtless this was one of the chief causes moving the Legislature to the enactment of the statute. The act makes all payments of compensation within certain limitations depend absolutely upon the "average weekly wages" received by the employee. St. 1911, c. 751, Part II, §§ 6, 9, 10 and 11, as amended by St. 1914, c. 708, §§ 2, 4, 5, 6. Those words are defined in Part V, § 2, as follows: "'Average weekly wages' shall mean the earnings of the injured employee during the period of twelve calen-

dar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district."

It is plain that this definition confines the ascertainment of wages to the actual employment at the time of the injury, save in the single instance where that is impossible by reason of brief employment in a line of work unusual to the employer. This exception no doubt is almost negligible in comparison with the general scope of the act. Even this exception refers to the same class of employment in the neighborhood for the ascertainment of its standard. All our decisions touching this matter go upon that footing. *Gillen's Case*, 215 Mass. 96. *Gove's Case*, 223 Mass. 187. *Bartoni's Case*, 225 Mass. 349. This definition and the decisions rendered respecting it follow directly the "basic principle of the act" as above stated, to the effect that "the cost of injuries incidental to modern industry" should be regarded as a part of the cost of production. The average weekly wages is throughout the act ascertainable only by reference to the wages actually paid at the expense of the industry at which the employee is working. Save in carefully specified exceptions, it is to be ascertained only by reference to the wages paid by the particular employer to the injured employee. It is apparent that the standard for determining the entire cost of production, so far as it includes the cost imposed by the workmen's compensation act, may be found by reference to that particular industry and employer.

The amendment to the act now under consideration must be construed as far as is reasonably practicable so as to harmonize with the general purpose of the act and the machinery provided for its

administration. When the word "wages" is used in one definite sense with reference to a particular standard in one vital part of the act, it must be presumed that it is used with reference to the same standard elsewhere in the act and its amendments, unless a different meaning is plainly expressed. *Gillen's Case*, 215 Mass. at page 98. It follows that in ascertaining the wages under the instant statute the circumstances to which weight can be given must be confined to the particular employer and kind of industry in which the injury was received. The increase of wages to which weight may be given is that which might have been expected from the particular employer in conducting his industry "under natural conditions."

This interpretation is confirmed by practical considerations.

The scheme of the act is that the employer shall be insured against the losses from personal injury to employees arising out of and in the course of their employment. The cost of such insurance can be determined so long as the basis on which compensation is to be reckoned is wages paid by the employer. It can readily be determined so long as the standard fixed by the definition of average weekly wages in Part V, § 2, above quoted, is followed. But it would be a matter of utter uncertainty if the compensation to be paid should depend, not upon wages paid, but upon wages which the Industrial Accident Board after an injury may find upon independent evidence, perhaps not readily open to the employer during the period of employment, that the injured employee might have earned in some other employment or field of activity.

"Wages" as used in the statute must be taken to refer to the only wages referred to anywhere in the act (with the exception noted), namely, the wages earned in the particular employment out of which the injury arose. If any exception to this rule were intended, doubtless it would have been stated with the same explicitness with which the only exception in the definition is set forth.

It follows that there was error in granting requests 3, 4 and 5 of the employee and in refusing to grant request 2 of the insurer.

There was no error in considering the appearance of the employee in passing upon the question whether his seeming intelligence, health and aptitude for the work would have been likely to receive recognition by increase in wages by the employer if the

injury had not been received. The inspection of a witness often is an important factor in the weight given to testimony by judge or jury.

It is not necessary to discuss the other questions argued by the insurer as they may not arise when the statute is applied correctly by the Industrial Accident Board.

Decree reversed.

EMILY NOYES *vs.* LOAMMI B. CARR.
WALTER E. NOYES *vs.* SAME.

Worcester. October 1, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Nuisance. Fence.

A fence, which has stood for thirty years, made of iron pickets about two feet high standing upon a stone curbing thirteen inches high, the front face of the curbing adjoining a public sidewalk and the nearest part of the iron fence being two inches back from the face of the curbing, cannot be found to constitute a nuisance.

The owner of such a fence, on whose land it stands, owes no duty to a traveller on the adjoining sidewalk in regard to the fence except not to injure him by wilful, wanton or reckless conduct.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries sustained by her on March 18, 1916, by striking her hand upon one of the iron pickets of a fence belonging to and maintained by the defendant, when she was falling by reason of having slipped upon ice and snow upon the sidewalk on Church Street, a public highway in the village of Whitinsville in the town of Northbridge, adjoining the foundation of the fence, and the second action by the husband of the plaintiff in the first case for loss of services and medical expenses suffered and incurred by reason of her injuries. Writs dated June 10, 1916.

In the Superior Court the cases were heard together by *O'Connell*, J., without a jury. The evidence is described in the opinion. At the close of the evidence the judge ruled that as matter of law there was no evidence of negligence on the part of the defendant and found for the defendant in both cases. The plaintiffs alleged exceptions.

The cases were submitted on briefs.

H. W. Brown & F. B. Spellman, for the plaintiffs.

G. S. Taft, for the defendant.

De Courcy, J. Emily Noyes, the plaintiff in the first case, (hereinafter referred to as the plaintiff,) while walking on the sidewalk of Church Street in Whitinsville, slipped on the ice and snow and in falling backward put out her hand to protect herself. Her hand struck the fence in front of the defendant's dwelling house and was seriously injured. This fence, constructed thirty years before, was made of iron pickets about two feet high, standing upon a stone curbing thirteen inches high. The front face of the curbing was on the street line; and the nearest part of the iron fence was two inches back from the face of the curbing.

The entire fence was on the land of the defendant, and it was not in consequence of any invitation or inducement, express or implied, on his part that the plaintiff was on this land at the place where she was injured. Whether she be regarded as a trespasser or a licensee she must take the land as she finds it; and the defendant was not answerable for her injury in the absence of wilful, wanton or reckless misconduct or negligence on his part. *O'Brien* v. *Union Freight Railroad*, 209 Mass. 449. *Romana* v. *Boston Elevated Railway*, 218 Mass. 76.

The fact that the defendant's land abuts on the public way does not make such fence a nuisance or create a liability to persons passing on the sidewalk. As was said in *McIntire* v. *Roberts*, 149 Mass. 450, 453, "In this Commonwealth the obligation of a city or town to put up guards against pitfalls which are so near to a highway as to make it unsafe for travellers, is similar to the obligation which it seems is imposed upon abutters by the English law. We are not aware that it has ever been decided here, that excavations made by the owner of land outside the limits of a highway, but so near to it as to make it unsafe for travellers, constitute a public nuisance, for creating or maintaining which the landowner may be punished." And see *Moffatt* v. *Kenny*, 174 Mass. 311. In like manner the landowner, in the exercise of dominion over the whole of his estate, may maintain proper structures near the line of travel on a street. *Howland* v. *Vincent*, 10 Met. 371. *McIntire* v. *Roberts*, *supra*. The contention that this fence constituted a public nuisance is disposed of by the cases of *Quigley* v. *Clough*, 173 Mass. 429, where

the plaintiff was injured by coming in contact with a barbed wire fence running diagonally from the corner of a house across the grass to the corner of two streets; and *Mead* v. *Strauss*, 202 Mass. 399, where the landowner maintained a line of stakes about sixteen inches high along the top of which a wire was strung three inches back from the line of the sidewalk.

Exceptions overruled.

MARTIN P. BOWES *vs.* MARGARET E. HENRY & another.

Worcester. October 1, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Broker. Agency.

Where the owner of land authorizes a real estate broker to sell it for him for $14,000 or $13,000 or possibly for $12,000 in cash above a bank mortgage of $4,500, and the broker fails to obtain a purchaser ready to pay the required price but produces two proposed purchasers each of whom is able and willing to pay for the land $11,000 in cash above the mortgage, and the landowner refuses these offers, but afterwards through another broker sells the land to another purchaser, not procured directly or indirectly by the first broker, for the price of $11,000 in cash above the mortgage, which he formerly had refused, all the transactions being in good faith, the first broker is entitled to no commission.

CONTRACT by a real estate broker for a commission alleged to be due to the plaintiff from the defendants, who were brother and sister and were the joint owners of certain land in Worcester with two houses thereon, for procuring a customer to buy this real estate. Writ dated July 2, 1915.

In the Superior Court the case was tried before *White*, J. The facts shown by the evidence are stated in the opinion. At the close of the evidence, the judge ruled that upon the whole evidence the plaintiff was not entitled to recover and ordered a verdict for the defendants. The plaintiff alleged exceptions.

W. A. Garrity, for the plaintiff.

J. C. Mahoney, (*S. H. Benoit* with him,) for the defendants.

PIERCE, J. On May 26, 1915, under an oral contract, the plaintiff, a broker, was employed to sell the property of the defend-

ants for $13,000 or $14,000 in cash above a bank mortgage of $4,500. The plaintiff made efforts to sell the property at the listed price without success. On June 10, 1915, in consequence of an offer of $12,000, the defendants signed an agreement with the plaintiff, entitled "Real Estate Option," as follows:

"We, Margaret E. and John J. Henry, agree to sell the property at No. 64 and No. 68 Oread Street through M. P. Bowes, for $12,000, owners agreeing to take $2,000 in a second mortgage at 6%, buyer paying $300 a year on the principal semi-annually, buyer agreeing to raise a first mortgage of $4,500 on No. 64, property to be sold in two deeds and second mortgage to be apportioned on the two properties. Option to hold good until June 18, 1915. No. 68 to be sold subject to a bank mortgage of $4,500."

Before the authorized offer of $12,000 was submitted to the prospective customer the option was revoked, as the defendants "did not wish to take a second mortgage on the property." As regards the authority of the plaintiff to sell the property, the revocation of the "Real Estate Option" left that right subject to a sale at the fixed price of the original contract, or at $12,000, upon the assumption of a modification of that contract implied in the option.

No reasonable construction of the acts of the parties results in a contract of employment to find a customer for the property at any price the defendants for any reason might thereafter accept. The undisputed facts would warrant the jury in finding that the plaintiff on June 13 and June 14, 1915, procured two customers who were ready, willing and able to buy the property at $11,000 upon the defendants' terms; and that on June 16, 1915, the plaintiff notified the defendants that the two customers would each give $11,000 for the premises, paying them in cash all above the bank mortgage. These offers were taken under advisement by the defendants, and in terms were never accepted nor rejected.

In March, 1915, the defendants had listed the property with three other brokers at $13,000 or $14,000. In June, 1915, one of the brokers, Marshall, made an offer of $10,000 in behalf of a customer named Press. This offer was rejected. On June 17, 1915, Marshall saw Press, offered the property to him at $12,500, then $12,000, and finally at $11,000. Press agreed to purchase the property paying $11,000 and in cash all above the bank mortgage.

This offer was communicated to the defendants by Marshall, was accepted by them, and an agreement to sell to Press was signed by them.

The only contract between the plaintiff and the defendants which the testimony tended to prove was to pay the plaintiff the customary commission should he succeed in selling the property at the original price fixed for its sale or for the sum of $12,000.

There was no evidence that the plaintiff ever procured a customer, ready, willing and able to pay for the property either amount upon the terms of the defendants; there was no evidence to warrant the jury in finding that the defendants agreed to sell the property to either of the customers presented to them by the plaintiff for a price less than $12,000, nor was there any evidence to warrant a finding that the actual purchaser was induced directly or indirectly to negotiate for and ultimately to buy the property through the efforts of the plaintiff. "One broker, who is unsuccessful in effecting a sale, does not become entitled to a commission upon the success of another." *Ward* v. *Fletcher*, 124 Mass. 224. *Gleason* v. *Nelson*, 162 Mass. 245. *Willard* v. *Wright*, 203 Mass. 406. *Woods* v. *Matthews*, 224 Mass. 577.

There is no evidence to warrant a finding of bad faith. *Smith* v. *Kimball*, 193 Mass. 582.

The Superior Court rightly ruled that on the evidence the plaintiff was not entitled to recover.

Exceptions overruled.

GEORGE F. LESLIE, trustee, *vs.* WILLIE WILDER & others.

Worcester. October 2, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Devise and Legacy.

A will contained the following residuary clause: "I direct that the remainder of my property if there be any, be divided in equal shares between Willie Wilder, the children of Ella Roper Phillips and the children of the late George S. Roper, share and share alike." There were six children of Ella Roper Phillips and three children of George S. Roper. Willie Wilder contended that he was given one

third of the residue. *Held*, that the property should be divided into ten equal parts, of which Willie Wilder should receive one.

BILL IN EQUITY, filed in the Probate Court of the county of Worcester on February 18, 1916, by the trustee under the will of Martha J. Roper, late of Sterling, for instructions.

On appeal to the Supreme Judicial Court the case was heard by *Braley*, J., upon an agreed statement of facts in substance as follows:

Martha J. Roper, the testatrix, died at Sterling, in this Commonwealth, on November 3, 1903, leaving a will and leaving no heirs at law other than her sister, Sarah B. Jewell. Her will was allowed on November 24, 1903. After making several bequests in the will, she provided that all the income of her property remaining, after the payment of certain legacies, should be paid to her sister, Sarah B. Jewell, during her life, and at the decease of her sister she directed that her estate should be divided and certain legacies paid, concluding with the following provision: "I direct that the remainder of my property if there be any, be divided in equal shares between Willie Wilder, the children of Ella Roper Phillips and the children of the late George S. Roper, share and share alike."

Sarah B. Jewell has died. The children of Ella Roger Phillips at the death of the testatrix, all of whom were living at the time of the hearing, were Horace W. Phillips, Warren N. Phillips, Clifton A. Phillips, Bertha Phillips, Adell M. Phillips, and Manola R. Phillips.

The children of George S. Roper at the death of the testatrix, all living at the time of the hearing, were Marcellus Roper, Herbert Roper and Ella Roper Hosmer.

There was no blood relationship between the testatrix and any of the residuary legatees, all the residuary legatees being grandnephews and grandnieces of Merrick Roper, the deceased husband of the testatrix.

The single justice made a decree affirming the decree of the Probate Court, which ordered the trustee to pay over and distribute one tenth of the remainder to each of the defendants, namely, Willie Wilder, Horace W. Phillips, Warren N. Phillips, Clifton A. Phillips, Bertha Phillips, Adell M. Phillips, Manola R. Phillips, Marcellus Roper, Herbert Roper and Ethel Roper Hosmer.

The defendant Willie Wilder appealed.

D. I. Walsh, T. L. Walsh & C. B. O'Toole, for the defendant Willie Wilder, submitted a brief.

C. B. Rugg, for the children of Ella Roper Phillips.

BRALEY, J. The testatrix, after making various specific legacies and creating a life estate for the benefit of her sister and directing that at the death of the tenant for life certain pecuniary legacies should be paid, provided further in the eleventh clause of the sixteenth article of her will as follows: "I direct that the remainder of my property if there be any, be divided in equal shares between Willie Wilder, the children of Ella Roper Phillips and the children of the late George S. Roper, share and share alike." The life tenant is dead, and, although not stated in the record, we assume that after payment of the legacies a fund remains for distribution under the residuary clause. It is the contention of the appellant that he is entitled to one third of the residue, while the remainder is to go one third to the children of Ella Roper Phillips and one third to the children of George S. Roper as a class; all of whom were living at the death of the testatrix. But this construction cannot be adopted. The intention of the testatrix is free from doubt. The legatees, who are referred to as "children" and not as heirs, are to "share and share alike;" and the naming of their respective mother and father was only for the purpose of designating the persons who were to take. *Weston* v. *Foster,* 7 Met. 297, 300. *Daggett* v. *Slack,* 8 Met. 450, 454. *Balcom* v. *Haynes,* 14 Allen, 204, 205. *Hill* v. *Bowers,* 120 Mass. 135. The plaintiff is instructed that the residue is to be divided into ten equal parts or shares of which the appellant is to receive one share and the nine defendants one share each. The decree of the court of probate should be affirmed.

Ordered accordingly.

FRANK HURNANEN, administrator, *vs.* BRONISLAW NICKSA.
SAME *vs.* GARDNER AUTOMOBILE COMPANY.

Worcester. October 2, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Motor Vehicle, Registration. *Sale*, Conditional. *Words*, "Owner."

One, who is in possession of a motor car as the purchaser under a contract of conditional sale by which the title to the car is to pass to him upon the payment of the final instalment of the purchase money and who has committed no breach of the contract, has a special property in the car which makes him its "owner" for the purposes of registration within the meaning of St. 1909, c. 534, § 2, as amended by St. 1912, c. 400. Following *Downey* v. *Bay State Street Railway*, 225 Mass. 281.

TWO ACTIONS OF TORT by the administrator of the estate of Matti Hurnanen, late of Gardner, the first against Bronislaw Nicksa and the second against the Gardner Automobile Company, a corporation, the declaration in each action containing two counts, as stated in the opinion, for causing the death and conscious suffering of the plaintiff's intestate by running into him on September 11, 1915, with a motor car operated by the defendant Nicksa and alleged to belong to the defendant corporation. Writs dated respectively September 16 and December 10, 1915.

The answer in each case contained a general denial and an allegation that the death and suffering of the plaintiff's intestate were caused by his negligence in stepping or jumping in front of the motor car.

The cases were tried together before *Sanderson*, J. The course of the trial and the answers of the jury to the questions submitted to them are stated in the opinion, where also are stated the facts in regard to the ownership and registration of the motor car. The judge ruled "as a matter of law that the man named in the contract [of conditional sale], the defendant Nicksa, had title which makes him the owner under the registration law of automobiles" and that the registration of the car under the facts shown was a legal registration. The jury in answer to the questions submitted to them by the judge found that the plaintiff's intestate was not in the exer-

cise of due care and that the defendant Nicksa was not negligent in operating the motor car. By instruction and order of the judge the jury returned a verdict for the defendant in each of the cases; and the plaintiff alleged exceptions.

A. M. Levy, for the plaintiff.

H. W. Blake, for the defendants.

PIERCE, J. These are actions of tort which were tried together.

The declaration in the first case contains two counts. The first count alleged the plaintiff's intestate's due care and the negligence of the defendant in operating a motor car in Gardner on September 11, 1915, and that the car, while so negligently operated, came into collision with the plaintiff's intestate, who was thereby killed. The second count is for conscious suffering, alleging the plaintiff's intestate's due care and the defendant's negligence in the operation of his car. The answer is a general denial, with an allegation of the plaintiff's intestate's contributory negligence. These issues were tried to a jury, who found for the defendant.

The declaration in the second case contains two counts: the first one being for the death of the plaintiff's intestate, caused by a collision with the defendant's motor car, alleging the plaintiff's intestate's due care and the defendant's negligence in operating and negligently suffering it to be operated without having the car properly registered. The second count alleges a collision with the defendant's motor car, the plaintiff's intestate's due care, the defendant's negligence in operating a motor car, that the car had not been properly registered, and the conscious suffering of the intestate. The answer is a general denial, with an allegation of the plaintiff's contributory negligence.

At the close of the evidence in the action against the automobile company, the presiding judge granted a motion to direct a verdict for the defendants and submitted the following special questions to the jury:

"First. Was Matti Hurnanen (the intestate) in the exercise of due care?

"Second. Was the accident caused by the negligence of Bronislaw Nicksa, the operator of the automobile? "

To both of these questions the jury answered, "No," and returned a general verdict for the defendant.

This procedure was correct. *Edwards* v. *Worcester*, 172 Mass.

104. *Burke* v. *Hodge*, 211 Mass. 156, 162. See also St. 1913, c. 716.

It was in evidence that the Gardner Automobile Company, a corporation engaged in the business of selling motor cars, on May 27, 1915, delivered to the defendant, Bronislaw Nicksa, a motor car under an agreement reading as follows:

"This agreement made this 27th day of May, A. D. 1915, between the Gardner Auto Company, a corporation having a usual place of business in Gardner, in the County of Worcester, and Commonwealth of Massachusetts, as lessor and Bronislaw Nicksa of Gardner, Mass., as lessee,

Witnesseth:

"That in consideration of the agreements of the lessee hereinafter mentioned, the lessor does hereby lease for the term of 1½ years from this date, and agrees to deliver forthwith to the lessee one automobile manufactured by Ford Motor Co., Style, Touring, Model T, Manufacturers Number 677065, upon the following terms and conditions:

"That said automobile shall remain the property of the lessor and shall not be removed from the town of Gardner, Massachusetts, without the written consent of the lessor or until it shall have executed and delivered a bill of sale thereof to said lessee.

"That said lessee shall pay to the lessor for the use of said automobile as follows: Twenty-five dollars per month payable on the first of each month until the full sum of three hundred seventeen 70/100 dollars with interest at the rate of six per centum shall have been paid to the lessor, all of which shall constitute and only be as rent for the use of said automobile, and when said sum has been paid in full with interest as aforesaid, the lessee may use said automobile free of charge for the balance of said term.

"The lessee promises to pay said rent in the amount and upon the terms specified, to keep the automobile fully insured for the benefit of the lessor and not to suffer any injury to be done to said automobile (reasonable wear and tear excepted), nor to lease or underlet the same to any person or persons; also to pay any damage caused to any other person or corporation or the property of any person or corporation by said automobile while in the possession of the lessee.

"It is further agreed that upon the failure of the lessee to make said payments or any of them, it shall be lawful for the lessor or its agent or attorneys to take possession of said automobile wherever it may be, and in case any of the conditions of this agreement shall be violated by the lessee, the payments to be made thereon shall be forfeited to the lessor and shall in no case be recoverable. In case the lessee shall, during the term of this lease, desire to purchase said automobile, all money paid as rent therefor shall be applied and accepted toward such purchase and the price shall be three hundred seventeen 70/100 dollars with interest at the rate of six per centum per annum from the date of this lease.

"But it is distinctly agreed and understood that until the lessee shall avail itself of the above option to purchase and shall pay the above amount in full or otherwise secure the same, the ownership of said automobile shall remain vested in the lessor.

"In witness whereof, the said parties hereunto set their hands and seals the day and year first above written.

"In presence of Lessor, Gardner Auto Co.
"Edith M. Shurtliff By W. W. Fitzsimmons.
Lessee, Bronislaw Nicksa. [Seal.]"

It was also in evidence that "Nicksa was taught by Fitzsimmons how to operate the car during the first week after its delivery and the execution of said writing. After that, Nicksa himself always drove the car and no one else drove it up to and including the time of the accident and all payments were made as they fell due. When not in use, the car was kept in the Gardner Automobile Company's garage and the company knew that Nicksa was operating it. At the time of the accident, the automobile was registered in the name of Bronislaw Nicksa and not in the name of the Gardner Automobile Company."

The presiding judge in the Nicksa case ruled "that the registration under the facts in this case was a legal registration," and directed a verdict for the defendant in that case as well as in the other. The legality of the registration of the car is the only question raised by the exception of the plaintiff to this ruling and order.

The agreement in the form of a lease is plainly a conditional sale. The amount agreed to be paid in instalments called "rent" when fully paid obligates the "lessor" to transfer the title to the

"lessee" when the last payment shall have been made "within the term of the lease," and it is expressly provided that "all money paid as rent therefor shall be applied and accepted toward such purchase" and that the price of the car shall be $317.70, coincidentally, the same sum of money which the lessee by signature and seal promises to pay. *Bailey* v. *Hervey*, 135 Mass. 172. *Lee* v. *Gorham*, 165 Mass. 130. *McCarthy* v. *Henderson*, 138 Mass. 310. *Smith* v. *Aldrich*, 180 Mass. 367. *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664, 672.

It is settled that a vendee in possession of personal property under a contract of conditional sale or lease, who has committed no breach of the terms of that contract, has a special property which he can sell or mortgage. *Keepers* v. *Fleitmann*, 213 Mass. 210. *Dame* v. *C. H. Hanson & Co. Inc.* 212 Mass. 124. *Federal Trust. Co.* v *Bristol County Street Railway*, 222 Mass. 35, 47.

It was decided in *Downey* v. *Bay State Street Railway*, 225 Mass. 281, that the word "owner" in the St. of 1909, c. 534, § 2, as amended by St. 1912, c. 400, "includes, not only persons in whom the legal title is vested, but bailees, mortgagees in possession and vendees under conditional contract of sale who have acquired a special property which confers ownership as between them and the general public for the purposes of registration."

It follows that the ruling of the judge and the direction of the verdict were right.

Exceptions overruled.

E. A. LEAVITT *vs.* ROBERT S. MAYNES.
LIDA K. RICHARDSON *vs.* SAME.

Worcester. October 2, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Evidence, Of handwriting, To impeach witness, Admissible for limited purpose, Admissions. *Practice, Civil*, Exceptions. *Letter.*

In an action of contract by a physician for compensation for services rendered to the defendant's wife, the defence relied upon was that the defendant was living apart from his wife for justifiable cause consisting of her cruel and abusive

treatment of him, and there was evidence of such treatment. To controvert this the plaintiff called the defendant's wife as a witness, who testified that she found in the mail box at her home two letters addressed to her husband which she opened and showed to him, that he took them, "looked at them and just smiled," would not read them and threw them on the table, and that the witness took them up. The letters were of an incriminating character. The defendant testified that he never had seen them before they were shown to him by his wife, that he knew nothing about them and that they did not come into his possession. The defendant called as a witness a woman whom the defendant's wife had named as having been suspected by her of improper relations with her husband. This woman testified that she did not write the letters, that she never had seen them and did not recognize the handwriting. At the request of the plaintiff's attorney she then wrote on a piece of paper the defendant's address and some further words taken from the letters. These specimens of handwriting were admitted in evidence without objection. The plaintiff then offered the two letters in evidence, and the judge admitted them, subject to a general exception by the defendant. *Held*, that the letters were admitted rightly for the purpose of comparison of handwriting to identify the writer of the letters, and also for the purpose of contradicting the testimony of the woman witness that she did not write the letters and never had seen them.

In the same case it also was *held*, that the contents of the letters were not admissible to show any tacit admission on the part of the defendant of the truth of the statements contained in them, there being no evidence of any act of the defendant that brought about the sending of the letters and he having testified that he did not know of them and would not read them, so that the letters, however clearly the writer of them might be identified, would not warrant in themselves any inference against the defendant.

In the same case it was *held*, that, the defendant not having asked the judge to restrict the effect of the letters to the identity of the handwriting and the impeachment of the witness, his general exception to their admission in evidence could not be sustained, as they were admissible for the purpose of such impeachment by contradiction.

TWO ACTIONS OF CONTRACT, against the same defendant, each on an account annexed, the first by a physician for $30 and the second by a nurse for $40.56, for services rendered to the wife of the defendant for a period of a few weeks before May 1, 1915. Writs in the Central District Court of Worcester dated respectively October 8, 1915, and June 22, 1915.

On appeal to the Superior Court the cases were tried together before *White*, J. The evidence is described in the opinion. The jury returned a verdict for the plaintiff in each case, in the first case in the sum of $32.14 and in the second case in the sum of $44.35. The defendant alleged exceptions to the admission in evidence of two letters, which the plaintiff asserted were written by Mrs. Mason, mentioned in the opinion.

The cases were submitted on briefs.

F. B. Hall & E. L. Anderson, for the defendant.

F. W. Morrison & H. Davenport, for the plaintiffs.

PIERCE, J. These were two independent actions of contract to recover on accounts annexed, in the case of the plaintiff Leavitt for services as physician and in the case of the plaintiff Richardson for services as nurse, which services were rendered to the wife of the defendant for a period between December, 1914, and September, 1915.

The defendant denied that he was liable for the two accounts declared on by the plaintiffs, because he was living apart from his wife for justifiable cause, to wit: her cruel and abusive treatment. There was testimony by the defendant and various witnesses in his behalf, that Mrs. Maynes was guilty of certain acts of cruel and abusive treatment and threats to poison and shoot the defendant Maynes, and also to kill his three children by a former wife. There was testimony in behalf of the plaintiffs, who called as a witness Mrs. Maynes, the defendant's wife, denying the acts of cruelty and the attempts to poison and said attempts of personal injury.

"In the course of the trial Mrs. Maynes, further testifying for the plaintiffs, said that her husband was acquainted with another woman by the name of Mason and that she had suspicions about their relations." Mrs. Maynes was asked by the plaintiffs' counsel as to two letters "which were of an incriminating nature against the defendant Maynes" and which were addressed as follows:

"Mr. Rob Maynes,
140 Maywood Street,
Worcester."

Concerning these letters Mrs. Maynes testified: "The mailman left them in the box at my home. . . . I always opened Mr. Maynes's letters. . . . He always knew I opened those because I showed them to him. . . . He just laughed and asked what I was going to do about it, and used profane language. . . . He didn't deny them. He didn't give me any satisfaction. . . . I handed him the letters. . . . He took them and looked at them and just smiled. He wouldn't read them. He asked what in h—— I was going to do about them and threw them on the table." To the question, "You took them up?" she answered, "Yes."

The defendant testified that he never had seen the letters in

question until they were shown to him by his wife; that he knew nothing about them and that they did not come into his possession. Mrs. Mason, the lady referred to by Mrs. Maynes as the "Mason woman," testified for the defendant that she did not write the letters in question, had never seen them, and did not recognize the handwriting. She also gave other testimony in support of the defendant's contention. At the request of the plaintiffs' attorney she wrote on a blank piece of paper the following words:

"Mr. Rob Maynes,
140 Maywood Street,
Worcester."
"Just a note." "I haven't got time."

These specimens of Mrs. Mason's handwriting were admitted in evidence without objection. The plaintiffs then offered in evidence the letters in question. They were admitted by the judge and the defendant excepted generally.

These letters were admitted rightly to enable the jury to determine the identity of the writer of the letters — a fact in dispute, by comparing the handwriting of the letters with the handwriting of the undisputed specimens of Mrs. Mason's writing; as also, in contradiction of Mrs. Mason's testimony that she did not write the letters and had never seen them. It is further to be observed that the weight to be given her testimony in this regard was of importance in the consideration of the value to be put upon her other testimony in support of the defendant's contention.

The contents of the letters "which were of an incriminating nature" were not tacit admissions by the defendant of the truth of their statements. There was no evidence that any act of the defendant brought about the sending of the letters or that he knew of them. Indeed, the evidence is explicit that he did not know of them and "wouldn't read them." The letters, however properly identified, would not of themselves authorize any inference against the defendant. *Commonwealth* v. *Eastman*, 1 Cush. 189, 215. *Fearing* v. *Kimball*, 4 Allen, 125, 128. *Jennings* v. *Wall*, 217 Mass. 278, 282. "*A fortiori*, a letter addressed to a person which he has not read cannot be admitted to affect him in any way." Bigelow, C. J., in *Commonwealth* v. *Edgerly*, 10 Allen, 184, 187.

But the defendant should have asked to have the evidence re-

stricted to the impeachment of the testimony of Mrs. Mason. Not having done so, it does not appear that he was legally prejudiced. *Smith* v. *Duncan*, 181 Mass. 435. *McGonigle* v. *Belleisle*, 186 Mass. 310, 312. *Commonwealth* v. *Anderson*, 220 Mass. 142, 145. *Shea* v. *American Hide & Leather Co.* 221 Mass. 282. *McCue* v. *Boston Elevated Railway*, 221 Mass. 432.

Exceptions overruled.

CHARLES KRASNICKI *vs.* BOSTON AND MAINE RAILROAD.

Worcester. October 2, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, Railroad. *Practice, Civil*, Judge's charge.

In an action against a railroad corporation for personal injuries from being pushed from the step of a car in a train of the defendant, that was backing before starting from a station, when the plaintiff was leaving the train after having gone upon it to see off two friends who were taking the train, the plaintiff's witnesses testified that the station master, whom they named, pushed the plaintiff from the car, and there was no evidence connecting any other employee of the defendant with the accident. The judge, against the objection of the defendant, left it to the jury to say, whether the station master in question "or any other employee of the defendant" pushed the plaintiff and caused him to fall from the car. The defendant's counsel pointed out that there was no evidence that any employee of the defendant other than the station master had injured the plaintiff, and asked the judge to modify his charge in this regard, which the judge refused to do. The jury returned a verdict for the plaintiff, and, after their verdict, in answer to questions from the judge, said that they did not find that the station master named "did it" and that they found that "some other employee" of the defendant did it. *Held*, that the charge was erroneous and prejudicial to the rights of the defendant.

TORT for personal injuries sustained by the plaintiff on February 22, 1915, at a station of the defendant at Winchendon, by reason of being forcibly ejected negligently and wilfully from a car in a train of the defendant which the plaintiff had entered by the defendant's invitation. Writ dated November 24, 1915.

In the Superior Court the case was tried before *Sanderson*, J. The evidence and the course of the trial are described in the opinion.

The judge refused to order a verdict for the defendant and submitted the case to the jury in the manner there described. The jury returned a verdict for the plaintiff in the sum of $5,000; and the defendant alleged exceptions to the refusal to order a verdict in its favor and to the portion of the judge's charge which is described and quoted in the opinion.

C. M. Thayer, for the defendant.

D. I. Walsh, T. L. Walsh & C. B. O'Toole, for the plaintiff, submitted a brief.

De Courcy, J. The plaintiff, with two friends who were to take the train for Boston, entered one of the defendant's cars at the Winchendon station. There was testimony that, as he was leaving the car and was standing on the platform or step after the train had begun to move backward, he was pushed off the car and seriously injured. The plaintiff and his friends not only referred to the aggressor as the "station agent," but in the court room they positively identified him as Mr. Hall, who was the station master. There was no evidence connecting any other employee of the defendant with the accident, although there was evidence that one Buss, a brakeman, was on the platform of the next car. The testimony presented by the defendant tended to show, among other things, that station agent Hall did not at any time go upon the Boston train.

In the course of his charge the presiding judge instructed the jury as follows: "It is for you to say, weighing all this evidence, from the first witness to the last, all who have testified anything material to that issue, whether the plaintiff's claim is made out that it was the act of an employee of the defendant that caused him to fall and receive his injury. . . . The burden of proof of course is on the plaintiff to prove that it was the wrongful act of the defendant or some agent or employee of the defendant that caused his injury. Unless the plaintiff establishes that by a preponderance of the evidence, his case falls. If he does establish it, understanding wrongful act as I shall explain it in a moment, liability is established. . . . It is important before you can decide that the plaintiff is entitled to damage, that you find there was some act as claimed by the plaintiff on the part of some employee of the defendant toward him. Unless you find that the station agent or some other employee caused him to fall from the train by pushing

substantially as he states, he would have no case. . . . I will ask you to answer another question, — whether Mr. Hall, the station agent, or any other employee of the defendant, pushed the plaintiff and caused him to fall from the car. . . . The fundamental question in this case is whether there was something in the nature of assault and battery, the use of violence on the part of the station agent or other employee, which caused him to fall from the car." The judge submitted to the jury the question, "2. Did Mr. Hall (who was the station master) or any other employee of the defendant push the plaintiff and cause him to fall from the car?"

The defendant objected to these parts of the charge "as indicating that a verdict might be rendered for the plaintiff if the jury found certain conduct on the part of the station master or other agent or employee of the defendant when there was no evidence that any agent of the defendant other than the station master had injured the plaintiff, and requested the judge to modify such passages, and also the question which the judge in the charge stated he wished the jury to answer by inserting such phrases as would limit the act to the station master." The judge declined to grant this request, and an exception was taken to such parts of the charge and to the submission of the question to the jury.

After the jury had returned a verdict for the plaintiff, and before they were discharged, the judge asked them the following questions, and received the answers as stated:

"1. I would like to ask if you found Mr. Hall did it, the station agent?" The jury answered, "No."

"2. Some other employee?" The jury answered, "Yes."

If the plaintiff's evidence merely had shown that his injury was caused by one of the defendant's employees engaged on the train, it would not have been necessary for him to go further and prove from whose hand the injury came. *Pomeroy* v. *Boston & Maine Railroad*, 172 Mass. 92. But he not only positively identified station agent Hall as the one who pushed him, but on the evidence disclosed by this record no one else could have been responsible. In these circumstances the jury well might suppose from the instructions quoted that they would be justified in finding that some employee other than the station agent was the aggressor, notwithstanding that the evidence did not support such a finding. In view of their answer to the question of the judge it seems apparent

that they were so misled. This error in the charge, to which the judge's attention was called specifically, was prejudicial to the rights of the defendant, and the entry must be

Exceptions sustained.

NELLIE CONNORS *vs.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Worcester. October 2, 1917. — October 23, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, Street railway.

In an action against a street railway corporation for personal injuries caused by stumbling over paving blocks in a city street where the defendant was relaying its tracks, a count of the declaration alleged that the defendant negligently suffered its track to be obstructed with paving blocks. It appeared that the defendant in relaying its tracks laid the rails, put in the ties and a cement foundation for the paving blocks, but that the city laid the pavement, consisting of granite blocks covered with a coat of "grouting," and that, while the work was going on, the "city protected that work by putting paving blocks on the side or whatever barriers they desired." The plaintiff testified that she tripped and fell over paving blocks. *Held*, that, the use or scattering of paving blocks over which the plaintiff testified that she tripped and fell being wholly under the supervision and control of the city, the defendant was not liable.

A motorman operating a street railway car, in passing through a city street that obviously is "broken up" in the process of repaving while the tracks of the street railway are being relaid, is not bound to anticipate that a traveller on foot will pass round a barrier of paving blocks and, stumbling and falling over scattered paving blocks placed there by the city, will be precipitated upon the track in front of the car or will come in contact with the car in falling.

TORT for personal injuries sustained on August 19, 1915, at about half past six o'clock in the morning while crossing Main Street in Worcester, where the tracks and roadbed of the defendant were in process of repair. Writ dated August 21, 1915.

In the Superior Court the case was tried before *O'Connell*, J. The evidence is described in the opinion. A foreman of the street department of the city of Worcester, who had charge of the "grouting," testified that "this grouting consisted in mixing sand and cement and pouring it into block pavings." At the

close of the evidence the judge ruled that the plaintiff could not recover and ordered a verdict for the defendant. At the request of the parties he reported the case for determination by this court, with a stipulation that, if his ruling and the ordering of the verdict were wrong, judgment was to be entered for the plaintiff in the sum of $600; otherwise, judgment was to be entered for the defendant.

E. A. Ryan, for the plaintiff.

C. C. Milton, for the defendant.

BRALEY, J. The plaintiff in describing her conduct and the cause of her injuries said, "I came from Walnut Street going to work and turned to the right to the other corner of the cross walk and started to cross over Main Street. I looked both ways and I saw a car coming north from City Hall and that was about at Barnard's. The streets were broken up and I saw no car going south from Lincoln Square. I picked my way along. The first thing I saw, the car was on to me when I saw it and I tried to step back and the street was in such a condition that I tripped. I do not know whether I went forward or backward. The pavement and things were behind my heels. . . . Before starting to cross Main Street, I looked down and up toward the north. I saw a car coming from City Hall going north but I did not see any car coming from Lincoln Square going south. Then I started to cross and I gave the other car, going north, a chance to get by the track that I was to cross and I got almost to the car track when I saw the other car, the one going south. It was almost on me and I stepped back and something tripped me—stones or something tripped me. . . . I noticed that the street was broken up. There was quite a high pile of stone back of me, and there was a space (indicating) about so big, not filled in with them. I picked my way the best I could round the paving blocks and this required my attention, to see where I was going. . . . Before I came to the paving blocks while crossing, I looked to the north to see if any car was coming going south, and again I looked toward Lincoln Square to see if there was any car going south. I did not see any car or hear any car going south. I might have looked twice, but I did not see a car going south until it was a little ways from me and I tried to get out of the way, and I would say the car was about four feet from me, but before this I was picking

my way along. When I first realized the car I tried to step back, to get out of the way of it, and as I say, I tripped on the paving and I do not remember whether I fell backward or forward afterwards. Then the car hit me, threw me down. . . . I was thrown down on the paving blocks, and I account for the injury to my head, one side as I thought was probably hit by the car and the other side, of course, I fell on and I think my head probably struck. . . . The granite blocks appeared to be laid along the side as though they had been working and were piled and put there to be used later on to finish that place. Where I was crossing, in some parts the paving blocks had been put in and others were put there, I suppose, to finish it sometime."

The declaration, which is in two counts, alleges in the first count, that the plaintiff was injured by being struck by a car operated by the defendant's agents or servants "and thrown heavily to the ground," and in the second count, that being required to keep its track in a reasonably safe condition for the use of travellers the defendant negligently suffered the track "to be obstructed with paving blocks and made dangerous by excavations without proper guards and protections to travellers." The question therefore is, whether there was any evidence which would have warranted the jury in finding that the defendant failed to use ordinary care in the discharge of its duty to the plaintiff as a traveller. See also *Dwyer* v. *Boston Elevated Railway*, 220 Mass. 193; *Torphy* v. *Fall River*, 188 Mass. 310, 314; *Hyde* v. *Boston Elevated Railway*, 186 Mass. 115.

The second count is based on R. L. c. 112, § 44. ". . . A street railway company shall be liable for any loss or injury which may be sustained by any person in the management and use of its tracks and during the construction, alteration, extension, repair or renewal of its railway, or while replacing the surface of any street which may have been disturbed as aforesaid, and which results from the carelessness, neglect or misconduct of its agents or servants who are engaged in the prosecution of such work, if notice of such loss or injury is given to the company and an action therefor is commenced in the manner provided by section twenty of chapter fifty-one. . . ."

If it be assumed that under R. L. c. 51, § 20, the jury could have found on the record that the notice was not invalid because

there was no intention to mislead and the defendant "was not in fact misled thereby," the evidence wholly fails to show negligence in making the repairs. The company laid the rails, put in the ties and the "original grouting." But the municipality laid the pavement consisting of granite blocks which upon being covered with a coat of "grouting" formed the completed surface of the street. It also appears that, after the surface had been "grouted" and the blocks put in position, the "city protected that work by putting paving blocks on the side or whatever barriers they desired." The plaintiff was required to offer evidence from which it could be found that the accident was caused by the company's negligence; but the placing, use or scattering of the paving blocks or stones over which she tripped or fell was wholly under the supervision and control of the city for whose acts if negligent the defendant is not responsible. *Hyde* v. *Boston*, 186 Mass. 115. *Stoliker* v. *Boston*, 204 Mass. 522, 537. It is not argued, nor does the evidence show, that she stepped into the spaces excavated for the "original grouting;" or which after grouting remained open until the blocks were inserted or laid.

If, however, the plaintiff cannot recover on this count, it is further contended, that under the first count there was evidence of the negligence of the defendant's motorman. The accident happened at half past six in the morning of August 19, 1915, and the night watchman employed by the defendant to "put the lanterns out" and "to keep the traffic off the new paving until the grouting was dry" and whose duties ended when "the day gang" started in the morning at eight o'clock, the jury could say, was present in the performance of his duties. While the street technically had not been closed to public travel the repairs were proper, and all the conditions impeding the plaintiff's passage were obvious, and she testified, "I noticed that the street was broken up," and the barrier on the side indicated that at that place the street had been temporarily withdrawn from public travel by reason of the repairs which rendered it unfit for use, and the company in the exercise of reasonable diligence was under no obligation to take further precautions for her safety. *MacFarlane* v. *Boston Elevated Railway*, 194 Mass. 183. The car is not shown to have been running at an unusual or excessive

speed; nor was the plaintiff, when she fell, passing over a cross walk. It is urged, however, that the motorman should have observed her position, and sounded the gong or stopped the car; but no reason appears why he should have anticipated that pedestrians would pass round the barrier of paving blocks, and stumbling and falling over scattered blocks of the city would be precipitated upon the track in front of, or would come in contact with, a passing car. *MacFarlane* v. *Boston Elevated Railway, ubi supra.*

We are of opinion that in accordance with the report, judgment should be entered for the defendant on the verdict.

So ordered.

WILLIAM H. WHALEN *vs.* NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Hampden. September 25, 1917. — October 29, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, Employer's liability. *Wires. Electricity. Notice.*

If a superintendent of a telephone company at twenty minutes before three o'clock in the afternoon orders one of his workmen to go upon a pole to paint it, the pole supporting not only the wires of the telephone company but also upon an upper cross arm the wires of an electric light company, and assures the workman that the electric light wires on the top cross arm are not charged with electricity and are "always dead until after four o'clock," whereas the electric light wires are charged with a dangerous voltage of electricity, and the workman thereupon, obeying the superintendent, ascends the pole and receives a shock of electricity which causes him to fall to the ground, sustaining injuries, in an action by him against his employer for his injuries thus sustained there is evidence for the jury that the order was a negligent one and that it was given by the superintendent within the scope of his authority.

In the same case it appeared that the notice of the time, place and cause of the injury given by the plaintiff under St. 1909, c. 514, § 132, as amended by St. 1911, c. 178, after stating the time and place of the accident, stated that "The injuries were caused by defective insulation and improper covering of wires upon the cross arms or gains of said pole, said wire being charged or electrified at the time, with electricity or other powerful current which caused [the plaintiff] to receive a shock or charge which resulted in his falling to the ground and receiving a broken leg." No objection to this notice was made at the trial. At the argument before this court the defendant sought to raise the question of the suffi-

ciency of the notice upon an exception to the refusal of the trial judge to rule that upon the pleadings and evidence the plaintiff was not entitled to recover. *Held*, that, assuming that the objection was open to the defendant, the notice sufficiently stated the cause of the accident without specifying that the direct cause of the plaintiff's injury was the negligence of the defendant's superintendent.

In the same case it was *held*, that, even if the notice had been insufficient in stating the cause of the injury, it was plain on the record "that there was no intention to mislead, and that the employer was not in fact misled thereby," the defendant through its superintendent having been in possession of all the facts.

TORT for personal injuries sustained on January 17, 1912, when the plaintiff was employed by the defendant as a lineman, by reason of the negligence of a superintendent of the defendant. Writ dated January 4, 1913.

The fourth count of the plaintiff's declaration alleged that the plaintiff received his injuries "by reason of the negligence of some person in the service of the defendant entrusted with and exercising superintendence and whose sole and principal duty was that of superintendence."

In the Superior Court the case was tried before *King*, J. The evidence is described in the opinion. At the close of all the evidence the defendant asked the judge to make the following rulings:

"1. Upon the pleadings and all the evidence the plaintiff is not entitled to recover in this action."

"5. The plaintiff is not entitled to recover under the fourth count of his declaration."

"8. The plaintiff as a matter of law was not in the exercise of due care.

"9. There is no evidence in the case which would warrant the jury in finding negligence on the part of the defendant or on the part of any one for whose conduct the defendant was legally responsible to the plaintiff."

The judge refused to make any of these rulings and submitted the case to the jury on the fourth count of the declaration. The jury returned a verdict for the plaintiff in the sum of $4,000; and the defendant alleged exceptions.

St. 1909, c. 514, § 132, as amended by St. 1911, c. 178, is as follows: "No action for the recovery of damages for injury or death under the provisions of the five preceding sections shall be maintained unless notice of the time, place and cause of the injury is

given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf. . . . If, from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed, and if he dies within said ten days his executor or administrator may give such notice within sixty days after his appointment. . . . A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. . . ."

J. N. Clark, for the defendant.

D. E. Leary, G. D. Cummings & G. F. Leary, for the plaintiff, submitted a brief.

De Courcy, J. The plaintiff was nineteen years of age and had had two months' experience as a lineman. On January 17, 1912, he was ordered by one Slavin to paint five new poles which had just been erected for the use of his employer, the defendant company, and of the Central Massachusetts Electric Company. On each pole were two cross arms; the first one twenty-six and one half inches from the top of the pole and supporting three wires of the electric company, the other about forty-six inches below the upper cross arm and supporting wires of the telephone company. The plaintiff had painted two of the poles and was painting the third in the same manner when he received a shock, fell to the ground and sustained the injuries complained of.

It is now conceded by the defendant that the evidence warranted the jury in finding that the plaintiff was in the exercise of due care, and that Slavin was a superintendent within the meaning of the employers' liability act. The only question it argues on the merits is that of the negligence of the superintendent. This issue we think was submitted rightly to the jury. There was evidence properly admitted, that the order to paint the poles which Slavin gave to the plaintiff was coupled with an express assurance that the electric light wires on the top cross arm were

not charged and were "always dead until after four o'clock." The accident happened about twenty minutes before three o'clock. Under the judge's charge the jury must have found that the statements made by Slavin were in the nature of a direction or command to the plaintiff to do certain work. That work would bring him near and in contact with the electric light wires, and the plaintiff was induced to perform it by the assurance of his superintendent that the wires were "dead." As matter of fact at that time the primary wires carried electricity having a potential of twenty-three hundred volts and were dangerous to the plaintiff while properly doing the work ordered. On the evidence the jury were warranted in finding that the order was a negligent one, and that it was given by Slavin within the scope of his authority as superintendent. *McPhee* v. *Scully*, 163 Mass. 216. *O'Brien* v. *Nute-Hallett Co.* 177 Mass. 422. *Lord* v. *Wakefield*, 185 Mass. 214. *Carriere* v. *Merrick Lumber Co.* 203 Mass. 322.

The other ground relied on by the defendant is the alleged insufficiency under the act of the written notice given to the defendant. No objection is made to the statement therein of the time and the place of the accident. As to the cause of the injury the notice stated: "The injuries were caused by defective insulation and improper covering of wires upon the cross arms or gains of said pole, said wires being charged or electrified at the time, with electricity or other powerful current which caused William H. Whalen to receive a shock or charge which resulted in his falling to the ground and receiving a broken leg," etc.

So far as the record discloses, no objection to the notice was made in the trial court. The defendant now seeks to raise it under his first and fifth general requests for rulings, which were, in effect, that upon the pleadings and evidence the plaintiff was not entitled to recover. Assuming that this objection is open to the defendant at this time, we do not think it can prevail. A reasonably correct statement of the facts relating to the cause of the accident was sufficient, without designating as the ultimate cause the negligence of the superintendent. *Lynch* v. *Allyn*, 160 Mass. 248. *Berube* v. *Horton*, 199 Mass. 421. Nor was it necessary to specify the kind of negligence under one or the other distinct clauses of the statute. *Brick* v. *Bosworth*, 162 Mass. 334. *Coughlan* v. *Cambridge*, 166 Mass. 268. It was enough that the notice

stated, as the cause of the plaintiff's injury, the electric shock by reason of which he fell to the ground. The notice went further and set out as the cause of that cause "defective insulation and improper covering of wires;" which the jury could find to be correct, as the covering on the wire was found to be burned. But, even if that unnecessary statement were incorrect, the statute provides that the notice "shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby." On this record plainly the court could not rule as matter of law, even if so requested, that the plaintiff intended to mislead the defendant by the unnecessary particularity of the notice, or that the defendant, which through its superintendent was in possession of all the facts, was in fact misled by it. St. 1909, c. 514, § 132, as amended by St. 1911, c. 178. *Drommie* v. *Hogan*, 153 Mass. 29. *Beauregard* v. *Webb Granite & Construction Co.* 160 Mass. 201.

Exceptions overruled.

JOHN J. HURLEY *vs.* BOSTON AND MAINE RAILROAD.

Worcester. October 1, 1917. — October 29, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, In obstructing highway for lawful purpose, Frightening horses on highway.

If a railroad corporation maintaining an overhead steel bridge above and across a highway has a right to use in a proper manner a swinging staging under the bridge for the purpose of painting the bridge, such right must be exercised with due regard to the public safety and the convenience of travellers, and the railroad corporation must use such a staging as will not unnecessarily obstruct the way and will not be likely to frighten horses; it must not maintain the staging for more than a reasonable time and, while the staging is over the highway, the corporation must use due care to prevent injury to travellers and to provide warning signals during periods of darkness.

In an action against a railroad corporation for damage to the plaintiff's horse, wagon and harness, by reason of the plaintiff's horse being frightened after sundown by a swinging staging maintained by the defendant without lights under an overhead bridge crossing above the highway, it is a question of fact for the

jury whether the temporary obstruction of the public way by the defendant was a reasonable one or whether the staging was an unreasonable structure or was maintained negligently.

TORT for damage to the plaintiff's horse, wagon and harness sustained on November 4, 1915, by reason of a swinging staging hanging from an overhead bridge of the defendant above and across Parker Street in the town of Gardner, whereby the plaintiff's horse was frightened badly so that he ran away and injured himself and broke the wagon and harness. Writ dated January 11, 1916.

In the Superior Court the case was tried before *Raymond*, J. The evidence is described in the opinion. At the close of the evidence the judge ordered a verdict for the defendant and reported the case for determination by this court. If the judge's ruling in ordering the verdict was right, judgment was to be entered for the defendant; if it was wrong, judgment was to be entered for the plaintiff in the sum of $100, damages and costs.

H. W. Blake, for the plaintiff.

C. M. Thayer, F. C. Smith, Jr., & G. A. Gaskill, for the defendant, submitted a brief.

DE COURCY, J. The defendant's railroad crosses Parker Street, a public way in the town of Gardner, on an overhead steel bridge. The width of the street between the two abutments is thirty feet, and the tracks of a street railway are located on the westerly side. The under side of the bridge is twelve and six tenths feet above the surface of the road. On the day of the accident the defendant's employees were painting this bridge, and in doing so used a swinging staging which hung down four and a half or five feet from the structure. This staging consisted of two planks held by ropes attached to the bridge, running with the girders, and across these were two planks extending from the easterly abutment twelve feet toward the centre of the street.

There was testimony on which could be found the following additional facts: The plaintiff, driving a gentle horse harnessed to a democrat wagon, approached this overhead bridge after sundown on November 4, 1915. The atmosphere was hazy, and it was getting dark. There was a steep pitch to the street and banks on each side, and the plaintiff was within twenty feet of the bridge when he first noticed the staging. It looked like a

big dark object: there were no lights on it, and he could not see any men working there. When the horse saw the staging it became frightened, refused to go underneath the bridge, came back quick, turned and broke the shafts, and threw the plaintiff and his companion over the dashboard. This action is to recover for damages to the horse, wagon and harness. The trial judge ordered a verdict for the defendant.

On the issue of his due care the plaintiff was entitled to go to the jury, notwithstanding the fact that, when he drove under this bridge in the morning on his way from his farm in Barre, the "horse did not like the looks of this swinging staging, but with a little coaxing and speaking to . . . went by." Indeed the defendant does not argue to the contrary. On the question of its alleged negligence the defendant contends that it had a right to use the staging in the necessary painting of its bridge, and further that it was not an object likely to frighten horses. No permit to block the highway was obtained from the town authorities, but the case did not proceed on that ground.

Assuming that the defendant had a right, on the ground of necessity or otherwise, to occupy a part of the highway while painting its bridge, yet that right must be exercised with due regard to the public safety and convenience. Even if it was necessary to make use of some kind of a staging to do this work, it was the duty of the defendant to employ one which would not unnecessarily obstruct the way, or be of such an unusual character as would be likely to frighten horses. It was also its duty not to maintain the staging for more than a reasonable time; and, while it was in the highway, to use due skill and care to prevent injury to travellers, and to provide warning signals during periods of darkness. See *Commonwealth* v. *Temple*, 14 Gray, 69, 75; *Morris* v. *Whipple*, 183 Mass. 27; *McCormack* v. *Boston Elevated Railway*, 188 Mass. 342.

Ordinarily the question whether a particular obstruction of a public way is a reasonable one or is negligently maintained, is one of fact for the jury. And the same rule applies to the maintenance in a public way of a structure which is naturally calculated, and may reasonably be expected, to frighten horses of ordinary gentleness. For instance, in *Jones* v. *Housatonic Railroad*, 107 Mass. 261, where a traveller on the highway sustained injuries through

the fright of his horse occasioned by a derrick which was maintained by the corporation on its own land but projected four feet within the limits of the way, it was held that the question of the defendant's liability was rightly submitted to the jury. The same principle was recognized in *Judd* v. *Fargo*, 107 Mass. 264, where the plaintiff's horse was frightened by a sled with some tubs on it, which the defendant left in the highway adjoining his farm. See also *Igo* v. *Cambridge*, 208 Mass. 571, 576; *Joyce* v. *Exeter, Hampton & Amesbury Street Railway*, 190 Mass. 304; *John A. Tolman & Co.* v. *Chicago*, 24 L. R. A. (N. S.) 97, and note.

In our opinion it was for the jury and not for the court to determine whether, on all the evidence, the plaintiff's injury was caused by an unreasonable or negligent use of the public way by the defendant. In accordance with the terms of the report judgment is to be entered for the plaintiff for $100, damages and costs.

Ordered accordingly.

CHARLES F. STEVENS, landowner.

Worcester. October 1, 1917. — October 29, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Building Laws. Tenement House. Building Inspector. Practice, Civil, Exceptions. *Constitutional Law. Words,* "Civil cause."

It here was *assumed*, but without so deciding, that an appeal to a judge of the Superior Court from an order of a building inspector under St. 1913, c. 655, § 55, applying for an order forbidding the enforcement of the order of the inspector is a "civil cause" within the meaning of R. L. c. 173, § 106, so that it may be brought before this court upon exceptions alleged in the Superior Court under that statute.

The provision of the building laws contained in St. 1913, c. 655, § 20, that "A building which is used, in whole or in part, as a . . . tenement house which has ten or more rooms or in which eight or more persons are accommodated or lodge or reside above the second story, the owner . . . of which is notified in writing by an inspector that the provisions of this act are deemed by him applicable thereto, shall be provided with proper egresses or other means of escape from fire, sufficient for the use of all persons accommodated . . . lodged or resident therein; but no owner . . . of such building shall be deemed to have violated this provision unless he has been notified in writing by such inspector what additional egresses or means of escape from fire are necessary," is a police regulation for the protection from fire of the lives of human beings within the constitutional power of the Legislature.

One, who under St. 1913, c. 655, § 55, has appealed to a judge of the Superior Court from an order of a building inspector applying for an order forbidding the enforcement of the order of the inspector, cannot be heard in that proceeding to contend that the statute of which he is taking advantage is unconstitutional in not providing for a trial by jury as to the establishment of the fundamental facts on which the jurisdiction of the inspector rested.

Whether a person who has taken such an appeal to a judge of the Superior Court, if afterwards a criminal prosecution or proceedings in equity should be instituted against him for failure to comply with the requirements imposed by the order of the building inspector, would have a right to a trial by jury, here was referred to as a question that was not before the court.

The statute quoted above is not unconstitutional in its operation upon the landowner in failing to provide for a trial by jury in connection with the review by a judge of the Superior Court of the order of the inspector.

On such an appeal to a judge of the Superior Court applying for an order forbidding the enforcement of an order of a building inspector, the landowner contended that the structure in question, instead of being a tenement house, consisted of two houses, and the judge found on evidence warranting such a finding that the building was one tenement house. *Held*, that this was a finding of fact which could not be pronounced erroneous.

In the same case it was contended by the landowner that a requirement of the order of the building inspector, that there should be an electric light at each landing of the front and rear stairways of the building, which should be kept lighted throughout the night, was unreasonable. No subsidiary facts or accompanying circumstances were shown indicating that the requirement was not a reasonable one or that it was in any respect capricious. *Held*, that this was a matter of detail largely discretionary in which the decision of the inspector when approved by a judge of the Superior Court would not be disturbed.

APPEAL, filed in the Superior Court for the county of Worcester on March 24, 1916, under St. 1913, c. 655, § 55, to a judge of the Superior Court for that county from an order of a building inspector applying for an order forbidding the enforcement of such order of the building inspector.

The appeal of the landowner, Charles F. Stevens, was as follows:

"And now comes said Stevens and says that on the seventeenth day of this March, 1916, he received through the mail a notice, order, requirement or direction of a building inspector of the building inspection department of the district police, a copy of which is hereto annexed marked 'A.'

"That he is aggrieved by said order, requirement and direction and hereby appeals to the honorable the judge of the Superior Court within and for said county for an order forbidding its enforcement and that a notice may issue as provided by statute for a hearing.

"That your complainant desires a trial by jury if there is any

provision for a jury. If there is no provision for a jury trial, y complainant claims the law referred to in said notice is unc stitutional and should be annulled.

"That the building referred to in said notice as number Chandler St. is a two-story brick building with a French ro covered with slate, each of the three floors is a tenement of fiv rooms only. Adjoining this building is another building referre to in said notice as 28 on Chandler Street, and separated fron the said number 26 Chandler Street by a brick wall with no openings in said brick wall and extending from the front wall to the rear wall of both said buildings and from the foundations in the bottom of the cellars to the roof so that either of said buildings could be removed or taken down without injury to or affecting the occupancy of the other, each building having separate front and rear entrances and neither of said buildings having anything in common with the other. That the said building numbered 28 on Chandler St. is also a two-story building of brick with a French roof covered with slate and contains one apartment of five rooms on each floor.

. . . . . .

"Wherefore your complainant claims that the laws referred to in said inspector's notice, a copy of which is hereto attached, marked 'A,' does not apply to said premises and said orders in said inspector's notice should be annulled or modified as your honor may deem meet, and appeals to a justice of the Superior Court for the county of Worcester for an order forbidding its enforcement."

The notice referred to above, of which the copy was marked "A," was addressed to the landowner and signed by the inspector, and otherwise was as follows:

"On March 16, 1916, I inspected the building located at 26–28 Chandler St., Worcester, the same being owned or controlled by you and you are hereby notified that under the provisions of chapter 655, Acts of 1913, the same being deemed applicable thereto by me, and in compliance therewith, you are hereby directed to provide the following in said building:

'Provide rope fire escapes, and notices descriptive of use of same, in all rooms used as lodging rooms above the first floor of said building.

"Provide an electric light at each landing in front and rear stairways, the same to be kept lighted throughout the night.

"Have front and rear egress doors made to swing out.

"Provide at least one approved chemical extinguisher in each tenement in said building, the same to be of at least 1½ gallons capacity each. All to be done subject to the approval of this department.

"The law allows thirty days for compliance with the above order. Please notify me as soon as you have complied with the same that I may issue certificates, as required by law, for this class of building."

The case was heard by *Sanderson*, J. The landowner asked the judge to rule that the act was unconstitutional in not providing for a jury to determine the facts in the case, and asked for a jury to decide the facts. He called the attention of the judge to the request for a jury contained in the appeal and asked for a ruling of the judge thereon. The judge refused to rule as requested, and refused to send the case to a jury or to have a jury empanelled to determine the facts. The landowner excepted.

The findings warranted by the evidence, so far as material, are stated in the opinion.

At the close of the evidence the landowner asked the judge to find as facts:

"1. That the premises to which the order or direction of the inspector relates, consist of two houses without connection or passage between them.

"2. That the order or direction of the inspector was not proper, necessary or reasonable, under the circumstances as shown by the evidence in the case, for the protection of the occupants of the building from injury by fire within the requirements as set forth under the provisions of St. 1913, c. 655."

The landowner also asked the judge to make the following rulings:

"1. That houses used for tenement purposes or for lodging purposes, though adjoining but separated by a brick partition wall sufficiently strong to carry either house, do not constitute a house or structure subject to the provisions of St. 1913, c. 655, § 20, unless said houses are connected by apertures through said wall so that they can be used in common or together.

"2. That two houses used for tenement or lodging purposes having separate entrances front and rear with a brick partition wall between, without passageway through said wall connected, are not subject to the provisions of St. 1913, c. 655, § 20, unless each or either is occupied or provides the rooms to the number stated in such section."

The judge refused to make either of the rulings requested, and filed a decision as follows: "The court, having heard the witnesses in the above entitled case and arguments of counsel, finds that the building erected at 26 and 28 Chandler Street, Worcester, Mass., is owned by the petitioner, that the whole building is one tenement house within the meaning of St. 1913, c. 655, § 20, and that it has more than eight rooms above the second story.

"The court affirms the order of the building inspector relating to said building dated March 16, 1916 and a copy of which is annexed to the petition in this case."

The landowner alleged exceptions.

M. L. Lewis, (*H. L. Parker* with him,) for the landowner.

A. E. Seagrave, Assistant Attorney General, for the inspector.

Rugg, C. J. It is provided by St. 1913, c. 655, § 20, that "A building which is used, in whole or in part, as a . . . tenement house which has eight or more rooms or in which ten or more persons are accommodated or lodge or reside above the second story, the owner . . . of which is notified in writing by an inspector that the provisions of this act are deemed by him applicable thereto, shall be provided with proper egresses or other means of escape from fire, sufficient for the use of all persons accommodated . . . lodged or resident therein; but no owner . . . of such building shall be deemed to have violated this provision unless he has been notified in writing by such inspector what additional egresses or means of escape from fire are necessary." The plaintiff, being the owner of a certain building in Worcester, was notified by an inspector according to the statute that additional means of egress and other means of escape from fire were required by him under the authority of this statute, the details of which were specified. Thereupon the plaintiff brought this proceeding under § 55, which provides that "Whoever is aggrieved by the order, requirement, or direction of a building inspector . . . may . . . appeal to a judge of the Superior

Court . . . for an order forbidding its enforcement; and . . . a hearing may be had before the court at such early and convenient time and place as shall be fixed . . . or the court may appoint three disinterested persons . . . to examine the matter and hear the parties; and the decision of said court, or the decision, in writing and under oath, of a majority of said experts . . . may alter, annul or affirm such order, requirement or direction."

Assuming in favor of the landowner (but without so deciding) that this is a "civil cause" within R. L. c. 173, § 106, so that it may be brought here by exceptions, it does not appear that any wrong has been done to the landowner.

The statute was enacted as a police regulation for the protection from fire of the lives of human beings. Statutes of this general nature are within the constitutional power of the Legislature. The housing of large numbers of people in populous cities in buildings not adequately protected against fire risk has direct relation to the public health and public safety. *Salem* v. *Maynes*, 123 Mass. 372. *Perry* v. *Bangs*, 161 Mass. 35, 38. *Commonwealth* v. *Hayden*, 211 Mass. 296. *Goldstein* v. *Conner*, 212 Mass. 57.

The initial decision of an inspector made under the statute, as to the kind of building which is in controversy, is not binding upon the owner as a finality under all circumstances. *Miller* v. *Horton*, 152 Mass. 540. *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306. But the statute makes provision for a petition by the landowner for a review by the court or by three experts appointed by the court of the decision of the inspector. It is by virtue of that provision that the present landowner has had the decision of the inspector reviewed by the Superior Court. He cannot avail himself of that review and at the same time ask this court to strike down the statute as unconstitutional because it does not enable him to demand a trial by jury. *Pitkin* v. *Springfield*, 112 Mass. 509. *New York Life Ins. Co.* v. *Hardison*, 199 Mass. 190. Doubtless if the landowner had not sought a review by the Superior Court of the action of the inspector in accordance with the terms of the statute, he would have a right to a trial by jury as to the existence of the fundamental facts upon which the jurisdiction of the inspector rested, when a criminal prosecution or proceedings in equity were instituted against him for failure to comply with the requirements imposed by the

inspector. Whether he may have such trial by jury after having availed himself of the hearing in court furnished by the statute is a question not now before us. But it is plain that, when appearing in court as a party plaintiff by the favor of the statute, he cannot at the same time invoke protection from the court against the entire proceeding, because he is not afforded a trial by jury as to the existence of the fundamental fact which gives the inspector jurisdiction. If he takes advantage of the protection given by the statute for a review by or under the direction of the court of all determinations made by the inspector, he can enjoy that protection only upon the terms set out in the statute.

The purpose of the statute is remedial. It is designed to afford security against loss of life by fire. The procedure is somewhat summary. Its manifest purpose is that there shall be a speedy decision of the questions involved and an expeditious execution of the requirements imposed. The objects to be attained would be defeated in many cases if there was a jury trial as to the questions decided by the inspector. *Stone* v. *Heath*, 179 Mass. 385. The statute is not unconstitutional in its present operation upon the landowner because of failure to provide a trial by jury in connection with the review by the court of the order of the inspector.

There was direct testimony to the effect that the structure in question was a tenement house and did not consist of two houses without connection between them. This positive testimony finds some support in the description of its construction and physical features. The decision of the judge to the effect that the building was one tenement house and the refusal to grant the rulings of law requested cannot be pronounced erroneous.

There is nothing in the specific requirements of the inspector which appears to be arbitrary, unreasonable, unnecessarily subversive of rights of property or not fairly directed to the accomplishment of rational results in immediate furtherance of the just purposes of the statute. *Welch* v. *Swasey*, 193 Mass. 364, 376. The only point argued in this respect is that the requirement of an electric light at each landing in front and rear stairways, to be kept lighted throughout the night, instead of permitting gas or some other method of illumination, was not warranted. No accompanying circumstances or subsidiary facts are shown which

indicate that this was not a reasonable direction or was in any respect capricious. A considerable discretion as to details naturally would be left to the determination of the inspector when approved by the judge of the Superior Court. *Kilgour* v. *Gratto*, 224 Mass. 78. *Boucher* v. *Salem Rebuilding Commission*, 225 Mass. 18.

Exceptions overruled.

HALBERT E. NEGUS *vs.* HENRY FOOTE.

Franklin. September 17, 1917. — October 30, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Husband and Wife. Alienation of Affections. Enticement and Seduction. Evidence, Circumstantial, Matters of common knowledge.

In an action for enticing and seducing the plaintiff's wife and thereby depriving the plaintiff of connubial consortium, where there is evidence of inclination and opportunity for adultery between the plaintiff's wife and the defendant, the plaintiff may be allowed to prove that, after he had lived apart from his wife for more than a year during a period when the defendant was living in the same house with the plaintiff's wife, the plaintiff's wife had a child.

It here was *said* that the jury could find as a matter of common knowledge and experience that a child born on a certain day was begotten approximately nine months before.

In the same case, in addition to the evidence above described, there was evidence that, when the plaintiff's wife was well advanced in pregnancy and the defendant knew her condition, he said, "that he would be very glad to marry her if it was so that he could, if it was so that she could get married." *Held*, that the case, including the evidence wrongly excluded, should have been submitted to the jury.

TORT for enticing and seducing the plaintiff's wife and thereby winning her affections and alienating her affections from the plaintiff, by reason of which the plaintiff lost the "affection, aid, assistance, comfort and consortium" of his wife. Writ dated September 7, 1915.

In answer to a motion by the plaintiff for specifications, the defendant filed specifications, in which he alleged that the enticement and seduction took place at Millers Falls in the town of Montague, that the defendant had unlawful sexual intercourse

with the plaintiff's wife at that place, and, as to other times and places at which the defendant had unlawful intercourse with the plaintiff's wife, alleged that these were at Millers Falls in the town of Montague in the house occupied before September, 1914, by the plaintiff and his wife, Mabel L. Negus.

The specifications concluded as follows:

"The plaintiff says that it is impossible to answer more fully the specific interrogatories of the defendant in the manner and form in which the same are set forth in the defendant's motion for specifications, but the plaintiff more fully specifies as follows: That the conduct of the defendant and the said Mabel L. Negus prior to, and after, September, 1914, was such as to show an adulterous disposition; that the plaintiff was not at home after September 12, 1914, and had no intercourse with his wife the said Mabel L. Negus after that date; that the defendant during the months of December, 1914, and January and February, 1915, occupied the same house with the said Mabel L. Negus, that a child was born to the said Mabel L. Negus on the fifth day of October, 1915.

"These specifications apply to both count one and count two of the plaintiff's declaration."

The defendant moved to expunge the matter contained in the last two paragraphs of the specifications as irrelevant and immaterial. His motion was allowed by *Aiken*, C. J.

The plaintiff then amended his declaration by adding a third count as follows:

"Count 3. And the plaintiff says that Mabel L. Negus is his lawfully wedded wife; that the defendant on or about the first day of January A. D. 1915 at Montague in the county of Franklin and at divers other times did have unlawful carnal knowledge of the body of the said Mabel L. Negus and did beget upon the body of the said Mabel L. Negus a child, of which child she was delivered on the fifth day of October A. D. 1915; whereby and by reason whereof the plaintiff lost the aid, comfort, and consortium of his said wife and was otherwise greatly injured and damaged."

The amendment was allowed by *Aiken*, C. J. The defendant demurred to the third count of the declaration as amended on the ground that a declaration, that a child born by the plaintiff's wife after her marriage to the plaintiff was illegitimate, was inadmissible on the part of the plaintiff.

The demurrer was overruled by *Aiken*, C. J., and the defendant appealed.

The case was tried before *Aiken*, C. J. The evidence introduced is described in the opinion. The plaintiff made the following offer of proof: "The plaintiff offers to show that from early September, 1914, until May, 1915, Negus, the plaintiff, did not have access to his wife; that during the months of January and February, 1915, Foote, the defendant, roomed and boarded in the house in which the plaintiff's wife lived and was the only man living there; that he had roomed and boarded there to some extent during November and December and there had been much intimacy between them for at least six months; that in midsummer Mr. Daly saw this woman in the family way in July and that she gave birth to a child on the fifth of October, 1915."

The Chief Justice ruled as follows: "The court excludes the offer to show the condition of Mrs. Negus in July and the birth of the child in October. I do not exclude any evidence of intimacy in respect to conduct further that you desire to show. You have already shown that. I do not know whether it is offered as an offer to show more than you have shown. If it is, I am not excluding it, but those two features of your offer I will exclude." The plaintiff excepted to the exclusion of the evidence.

The Chief Justice ruled that the action could not be maintained upon the evidence presented, and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

H. E. Ward, (*F. L. Greene* with him,) for the plaintiff.

W. A. Davenport, for the defendant, submitted a brief.

BRALEY, J. The cause of action stated in each count of the amended declaration is for loss of consortium, and the allegation of the alienation of the affections of the plaintiff's wife through the alleged acts and conduct of the defendant only go in aggravation of damages. *Hadley* v. *Heywood*, 121 Mass. 236. *Nolin* v. *Pearson*, 191 Mass. 283, 287, 288. While the action can be maintained without proof of adultery, *Nolin* v. *Pearson*, *ubi supra*, *Webber* v. *Benbow*, 211 Mass. 366, 368, it is clear upon the record that to make out a case for the jury the plaintiff was obliged to offer evidence of his wife's infidelity in which the defendant was a participant. It has long been settled that previous acts of familiarity, unless in the discretion of the judge they are too remote,

are admissible to show an adulterous disposition, and there is no difference between acts of familiarity and actual adultery, when offered for the purpose indicated, except in the additional weight and significance of the latter act. *Beers* v. *Jackman*, 103 Mass. 192. *Thayer* v. *Thayer*, 101 Mass. 111. It was one link in the chain of proof to show adultery by the wife, and as the jury would have been warranted in finding non-access by the plaintiff during the entire period covered by the offer of proof which was excluded, evidence that his wife had been delivered of a child tended to prove the offence. *Commonwealth* v. *Morrissey*, 175 Mass. 264. See *Commonwealth* v. *Gray*, 129 Mass. 474. But, if no evidence had been introduced from which in connection with the offer of proof the jury would have been warranted in finding that the defendant was the father, the plaintiff has not been prejudiced. "The evidence by which the act of adultery is proved is seldom direct. The natural secrecy of the act makes it ordinarily impossible to prove it, except by circumstantial evidence," and "The intent and disposition of the parties toward each other must give character to their relations, and can only be ascertained, as all moral qualities are, from the acts and declarations of the parties." To this end their antecedent and subsequent conduct are admissible if it has a tendency to prove the fact. *Thayer* v. *Thayer*, *ubi supra*.

The ruling excluded proof of the birth of a child on October 5, 1915. If the jury found that the wife was delivered on this date they further could find in accordance with common knowledge and experience that the child was begotten nine months previously, or approximately in January, 1915. The defendant was employed as a chauffeur by the plaintiff's father-in-law, one Ross. The plaintiff with his wife and minor daughter kept house by themselves, but the defendant boarded and lodged with his employer. During the summer of 1914 the plaintiff's wife and the defendant "were riding together a good deal . . . were frequently in the garage together and often sat together upon the porch in the evening." And the plaintiff further testified that "his wife frequently remained in the garage with Foote in the evening after every one else had left;" that he had "seen the lights go out, and I have waited perhaps fifteen minutes before my wife would show up;" that "he remonstrated with his wife about her conduct and

that such conduct on her part was the cause of his going away from his home" finally in September, 1914, since which time he has not lived with his wife.

The defendant testified that he knew of the plaintiff's absence, and that "soon after Thanksgiving in 1914, at the request of Mrs. Ross, . . . he boarded and roomed in the house of Mrs. Negus; . . . that he left the employ of Ross about February, 1915," but returned "sometime in May, 1915," and then stayed at the Ross house where "he had a room on the second floor" and "that Mrs. Negus had a room which did not adjoin his on the second floor." And a witness for the plaintiff testified that in July, 1915, when as the jury could say Mrs. Negus was well advanced in pregnancy and the defendant knew of her condition, he said, "that he would be very glad to marry her if it was so that he could, if it was so that she could get married." We are of opinion there was evidence from which the existence of an adulterous inclination or desire between the defendant and Mrs. Negus could be found, with an opportunity for coition at a period which would charge him with the paternity of the child. Or in other words, it was for the jury using the logic of common experience to consider, under appropriate instructions, cause and effect, and to determine whether all the circumstances were reasonably sufficient to establish the defendant's guilt, or whether they were equally compatible with his innocence. *Thayer* v. *Thayer, ubi supra. Beers* v. *Jackman, ubi supra. Commonwealth* v. *Bean*, 137 Mass. 570, 571. *Sullivan* v. *Hurley*, 147 Mass. 387. *Francis* v. *Rosa*, 151 Mass. 532. The case of *Commonwealth* v. *O'Connor*, 107 Mass. 219, on which the defendant relies is clearly distinguishable. Compare *Commonwealth* v. *Morrissey*, 175 Mass. 264.

The evidence should have been admitted, and the exceptions must be sustained.

So ordered.

JOHN O'BRIEN'S CASE.

Worcester. October 1, 1917. — November 2, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Workmen's Compensation Act.

A workman sixty-four years of age, who was employed in a comb factory, had started to go home at the end of a day's work and was descending a stairway on the outside of the factory building which led from the second floor to the ground, when in some way he lost his balance and fell over a railing, which was on the right hand side of the staircase and was about three feet high, and was injured. There were two other ways of going to the street from the second floor, but the stairs on which the accident happened were used by some of the men in the department of the factory in which the employee worked. In a claim made by the employee under the workmen's compensation act the Industrial Accident Board found that the injury "arose out of and in the course of his employment." *Held*, that the finding was warranted, the reasonable probability that an employee might be injured in descending such a staircase being a risk of the claimant's employment in that factory.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding compensation to John O'Brien, who was employed by the Standard Comb Company in its factory at Leominster, for an injury received on September 12, 1916, as described in the opinion.

The case was heard by *Sanderson*, J. It appeared that no new evidence was presented before the Industrial Accident Board, who based their decision wholly upon the report filed by the arbitration committee. The facts shown by that report are stated in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

The case was submitted on briefs.

C. C. Milton & F. L. Riley, for the insurer.

J. W. Healey, for the employee.

PIERCE, J. It was agreed that the employee received an injury on September 12, 1916, in the course of his employment; that the claim for compensation was filed on January 5, 1917, and that the employer had knowledge of the injury when the accident occurred.

On appeal to this court the only question presented is whether or not the injury which the employee received on September 12, 1916, arose out of his employment.

The facts were these: The employee was sixty-four years of age and was practically blind as to his right eye. He had worked for the employer when there was work for him to do for five years, and was always faithful at his work. His vision was ample so far as his working needs were concerned and he could see with his left eye to go down the stairway upon which the injury occurred. The accident happened at about six o'clock in the evening after the whistle had blown and while the employee was going down stairs on his way home. The stairway from which the employee fell is on the outside of the building of the employer and goes up from the ground to the second story. It is covered by a roof which is held up by posts: one at the top of the stairway, one about five feet down, one some feet below that and still another farther down. There is a railing about three feet high on the right side of the stairs as one comes down. These stairs were used by some of the men in the employee's department. There are three ways of going down to the street from the second floor and the men had the privilege of using any one of the stairways. There was evidence that the employee had his hand on the railing part way down the stairs; that momentarily he took his hand off the railing; that other employees were rushing down the stairs; that when he reached the third upright post and the ninth step from the bottom, he reached for the railing again, lost his balance and went right over the railing to the ground. Upon all the evidence the Industrial Accident Board found that the employee "received a personal injury which arose out of and in the course of his employment, on September 12, 1916, by reason of a fall while leaving the premises of his employer, which was occasioned either by a misstep, which caused him to slip, or the loss of his balance while reaching for the railing of the stairway down which he was proceeding."

We are of opinion that there is a reasonable probability that some employee in the course of his employment will fall and receive an injury while descending a stairway of an employer, constructed and used as the stairway was in the case at bar. It follows that the likelihood of such a fall is a risk and hazard of that business.

Sundine's Case, 218 Mass. 1. *Von Ette's Case*, 223 Mass. 56. *Cox's Case*, 225 Mass. 220.

Hewitt's Case, 225 Mass. 1, and *Sanderson's Case*, 224 Mass. 558, are distinguishable on their facts.

Decree of Superior Court affirmed.

EDWARD W. PHILBRICK *vs.* EDWARD C. CREED & another.

Suffolk. November 20, 1917. — November 21, 1917

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, Disbarment proceedings. *Attorney at Law*, Disbarment proceedings.

A suit in equity, begun by a common law writ, cannot be maintained for the disbarment of an attorney at law.

BILL IN EQUITY, inserted in a common law writ dated February 9, 1917, against an attorney at law and the Bar Association of the City of Boston, praying that the defendant attorney be removed from his office and that the defendant association "show cause, if any it has," why this prayer should not be granted.

The defendant Creed inserted in his answer matter in lieu of a demurrer, averring (1) that there is no precedent nor justification for beginning a disbarment proceeding by a writ, and (2) that there is no precedent nor justification for instituting disbarment proceedings on the equity side of the court.

The defendant Bar Association of the City of Boston in its answer also demurred to the bill.

The case was heard upon the demurrers by *Brown*, J., who made a decree that the special matter by way of demurrer contained in the answer of the defendant Creed be sustained and that the demurrer of the Bar Association of the City of Boston also be sustained, and ordering further that the bill be dismissed. The plaintiff appealed.

E. W. Philbrick, pro se, submitted a brief.

R. Spring, for the defendant Creed.

R. H. Wiswall, for the defendant Bar Association of the City of Boston.

BY THE COURT. This is a bill in equity seeking the disbarment of an attorney at law. It was begun by an ordinary writ of summons and attachment. Such a proceeding cannot be instituted or maintained in this way. *Boston Bar Association* v. *Greenhood*, 168 Mass. 169, 182. *Boston Bar Association* v. *Casey*, 211 Mass. 187; 227 Mass. 46, 51. *Randall, petitioner*, 11 Allen, 473. *Matter of Allin*, 224 Mass. 9.

Decree affirmed.

JULIUS J. COHEN *vs.* KATE LEVY & another.

Suffolk. November 22, 1917. — November 23, 1917.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Costs, Memorandum of decision.

Nothing is better settled than the rule that in a suit in equity the awarding of costs rests in the sound discretion of the trial judge.

Where in a suit in equity the trial judge before making a decree dismissing the bill filed a memorandum of decision, in which he ordered that costs should be awarded to the defendants, and, after a subsequent hearing, revoked this order for costs and ordered the entry of a decree dismissing the bill without costs, it was *held* that there was nothing in the action of the judge to indicate an abuse of discretion.

BILL IN EQUITY, filed in the Superior Court on January 16, 1914, seeking to apply to the payment of an alleged debt of $160.15 for goods sold and delivered by the plaintiff to the defendant Levy certain stock in trade and fixtures alleged to have been mortgaged by the defendant Levy to the defendant Harry L. Lurie in fraud of the creditors of the defendant Levy.

On motion of the plaintiff the bill was allowed to be amended by adding as a defendant Yetta Lurie, the wife of Harry L. Lurie, alleged to be the owner of the stock in trade and fixtures under a foreclosure sale of the mortgage alleged to have been made fraudulently by the defendant Levy.

The case first was heard by *Wait*, J., who made a decree, which was reversed by this court in a decision reported in 221 Mass.

336, on the ground that Yetta Lurie, although ordered to be made a party defendant, had not been made one either by the service of a subpoena or by a voluntary appearance, and that she and one Guttentag, a constable who held the proceeds of the foreclosure sale, were necessary parties and ought to be joined as defendants.

After the issuing of the rescript in accordance with that decision the plaintiff was allowed on June 4, 1915, to amend his bill by filing a supplemental bill in which Yetta Lurie and Guttentag were joined as additional defendants, and they appeared and filed answers to which the plaintiff filed a replication.

The case was heard by *Lawton*, J., who filed a memorandum of decision, which concluded as follows: "I am not satisfied that the defendant Katie Levy made the mortgage with intent and purpose to defraud her creditors; still less am I satisfied that that purpose, if it did exist, was known to, or participated in, by the defendant Harry Lurie or the defendant Yetta Lurie. In each case [the other case referred to being a suit by other plaintiffs against the same defendants], the bill is ordered to be dismissed with costs."

Later, after a hearing upon a motion for a final decree, the judge made the following supplemental memorandum:

"After memorandum and upon hearing on the form of the final decree, the plaintiff objects to the allowance of costs and moves that the bill be dismissed only as to the defendants other than Kate Levy, and that he be allowed to amend his bill as against her into an action at law.

"The order for costs contained in the memorandum is vacated, the motion for leave to amend is denied, and there is to be a final decree dismissing the bill without costs and without prejudice to the right of the plaintiff to bring an action at common law against the defendant Kate Levy."

By order of the judge a final decree was entered "that the bill be dismissed without costs." The defendants appealed.

M. H. Steuer, for the defendants.

W. Charak, for the plaintiff, submitted a brief.

By THE COURT. This is an appeal by the defendants from a decree dismissing without costs a suit in equity. It is of no consequence that previous to the entry of the decree there had been

an intimation by the trial judge that costs would be awarded to the defendants. *Waucantuck Mills* v. *Magee Carpet Co.* 225 Mass. 31, 33. Scarcely anything is better settled than that in equity costs rest in sound judicial discretion. There is nothing to indicate an abuse of discretion.

Decree affirmed with costs of this appeal.

CHARLES G. CUNNINGHAM *vs.* E. GERTRUDE BRIGHT.

Essex. October 16, 1917. — November 26, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Attachment. Trust. Land Court. Judgment. Execution. Notice. Words, "Special attachment."

The validity of an attachment of real estate is not impaired by the fact that the attaching officer in his return made a description of the property by metes and bounds and called the proceeding a "special attachment."

An attachment of land as the land of W standing in his name as trustee, where it appears that W held the land under an instrument creating a real estate trust with the interests of the beneficiaries represented by certificates, that all the certificates were indorsed to W, that nobody else had paid anything for them and that they were treated by him as his own, is a valid attachment, the legal and equitable title to the land having been merged in W so that the trust became a mere form or at most a naked trust which W was entitled to terminate for his own benefit at any moment.

Under R. L. c. 128, § 37, which provides that a registration of title by the Land Court shall bind the land and quiet the title thereto and shall be conclusive upon and against all persons, a decree of that court, that the title to certain land is in W as trustee, is not contradicted or falsified by showing that W was trustee only for himself and that the words of the decree meant simply that the title was in W as an individual.

Under the provision of R. L. c. 178, § 28, which provides that an officer who has served an execution shall post the notices of the execution sale "in a public place," a statement contained in the return of such an officer that he posted the notice of the sale "in one place in the City of Salem, to wit, at the registry of deeds," shows a compliance with the statute without the use of the word "public" before the word "place," the registry of deeds of a county being a public place in the same sense as is a town hall or a post office and it not being necessary for the return to follow the precise words of the statute.

PETITION, filed in the Land Court on November 28, 1910, and amended on April 5, 1915, by the trustee under an agreement

dated January 23, 1903, creating a trust called the Marblehead Associates, praying for an order cancelling the memoranda of an attachment and of a sheriff's deed upon the certificate of title issued by the Land Court to Charles D. Wainwright as trustee of the Marblehead Associates and for the issuing to the petitioner of a new certificate of such title free from incumbrances.

The case was heard by *Davis*, J. The evidence is described in the opinion. The petitioner asked the judge to rule that he was entitled to a decree expunging the registration of the attachment and of the sheriff's deed and ordering the issuing of a certificate of title to the petitioner free from such attachment and deed. The judge refused to make this ruling and also refused to make other rulings requested by the petitioner. He ruled that the attachment was valid and that the execution sale was valid, and ordered that the petition should be denied. The petitioner alleged exceptions.

W. C. Cogswell, for the petitioner.

V. C. Lawrence, (*F. D. Sawin* with him,) for the respondent.

RUGG, C. J. This is a petition in the Land Court by the present trustee of the Marblehead Associates to expunge from the certificate of title issued in the name of Charles D. Wainwright, as former trustee of the same associates, an attachment and sheriff's deed to the respondent. The pertinent facts are that Wainwright bargained for the purchase of a tract of land in Marblehead to be developed for dwelling house purposes. He paid a part of the purchase price in cash and a straw man at his request gave a mortgage for the balance. He caused an agreement and declaration of trust, similar to that in litigation in *Hussey* v. *Arnold*, 185 Mass. 202, to be executed between himself as trustee and four beneficiaries, under the name of "The Marblehead Associates." The purpose of the trust was to develop and dispose of land to which title might be acquired. The trustee had full power in the premises, but was protected against personal liability. Four friends of Wainwright signed the agreement and declaration of trust, each subscribing $5,000; but they paid no money and took no part in the affair except forthwith to indorse to Wainwright the four certificates of beneficial interest issued in their names. The title to the land, subject to the mortgage, was conveyed to Wainwright as trustee under the declaration of

trust. The agreement, declaration of trust and deed were filed for registration and a certificate of title under the land registration act was issued in the name of Wainwright as such trustee. He proceeded to develop the property and incurred liabilities to a considerable amount. He used the certificates of beneficial ownership in the trust, together with other securities of his own, as pledges to secure notes signed by him as trustee and by himself personally. The land scheme ultimately was a failure. The mortgage was released upon a part of the land and that part was attached by a personal creditor of Wainwright. The respondent holds title under an execution sale upon a judgment recovered in the action in which the attachment was made. The validity of that title is the issue here presented.

1. The officer's return of attachment, upon which the respondent's title depends, recited that he had "specially attached" all the right, title and interest of Charles D. Wainwright in the described parcel, "the record title to which stands in the name of Charles D. Wainwright, Trustee." The use of the words "special attachment" is a matter of convenience. They are not found in § 1 or in § 47 of R. L. c. 178. They occur in the opinion in *Lyons* v. *Urgalones*, 189 Mass. 424, 427, and are used in the common speech of the profession. An attachment of real estate by particular instead of by general description is not necessarily confined to parcels fraudulently conveyed to third persons. The validity of an attachment of real estate is not impaired by the circumstance that the officer in his return makes a description of it by metes and bounds, and calls it a special attachment. It was not an inapt expression to term the attachment in this instance special, although no third persons nor fraudulent conveyances were involved. The substance of the matter was an attachment of the land owned by Wainwright individually, standing in his name as trustee.

2. The attachment in this way of the land as the land of Wainwright, standing in his name as trustee, was valid. The consideration for the conveyance of the real estate was all paid by Wainwright. The record title was in him as trustee. All the certificates of beneficial interest in the trust were indorsed to him. No one else had paid anything for them. So far as they were paid for at all, they were paid for by him. No other person

claimed any title to them as owner. He dealt with them as absolute owner. He had the general title to them even though he had pledged the title to them as security for money borrowed. *Thompson* v. *Dolliver*, 132 Mass. 103. That transaction did not affect his legal title. He therefore was both trustee and sole beneficiary. He united in himself all legal and equitable interests arising out of the transaction. Both the legal and equitable title merged in him. *Putnam* v. *Collamore*, 120 Mass. 454. See *Sears* v. *Choate*, 146 Mass. 395. It was conceded during the argument at the bar that all liens to which the certificates were subjected by pledge at the time of the attachment had been discharged, so that, if there could be any question in this particular, it does not arise on this record. The trust became a mere form. The only person really interested was Wainwright. It was at most a mere naked trust which Wainwright was entitled to terminate for his own benefit at any moment and thereby to vest in himself the apparent legal as well as the beneficial and equitable title. It is of no consequence how many agreements, declarations of trust or other documents may be used, the truth of the matter is all that need be considered.

It is not possible for a debtor to screen his property from his creditors or place it beyond the reach of direct attachment for his personal debts by the adoption of any such business contrivance as that here disclosed. See *Pacific National Bank* v. *Windram*, 133 Mass. 175. Wainwright was using his form of title as trustee as a mere *alias*, another name for himself. Even if there had not been a merger of all titles in Wainwright, at the lowest he individually was entitled to a present conveyance and therefore the land was subject to levy on an execution for his debts under the latter part of § 1 of R. L. c. 178.

Section 47 of R. L. c. 178 has no application to the facts of this case. That section renders void the levy of an execution unless a writ of entry be brought within one year after the return of the execution only in instances where the title stands in the name of another than the judgment debtor. The provisions of that section and the need for them restrict its scope to instances where the title and possession are in a person who is not the debtor. *Hunt* v. *Mann*, 132 Mass. 53.

There is nothing inconsistent with this result in R. L. c. 128,

§ 37, which provides that a decree of registration entered by the Land Court shall bind the land, quiet the title thereto and be conclusive upon all persons. The facts show that the words in that decree descriptive of Wainwright as trustee meant, both at that time and since, simply Wainwright as an individual. It is not a contradiction or falsification of the decree of registration to declare this as their real meaning. It is simply an interpretation or construction of its terms. Substance is put in the place of form. The truth is substituted for a fiction. One cannot at the same instant be both the single trustee and the sole beneficiary of the same estate. There is nothing in the land act which requires the recognition of such a legal incongruity. The attachment and levy upon the land as the land of Wainwright individually was valid.

3. The officer's return of levy and sale stated that he posted the notices of sale "in one public place in said town of Marblehead, the town in which said land lies, to wit, Abbott Hall, and in one public place in the town of Swampscott, to wit, at the town hall, and in one place in the City of Salem, to wit, at the registry of deeds." The objection that this is insufficient because of the omission of the word "public" before the word "place" preceding the words "in the City of Salem" cannot be sustained. It is required by R. L. c. 178, § 28, that these notices be posted in a "public place." Compliance with the terms of the statute must appear from the officer's return and cannot be proved by other evidence. *Frazee* v. *Nelson*, 179 Mass. 456, 460. But it is not essential that the precise words of the statute be followed in the words of the return. It is enough if it appear that all the requirements of the statute have been followed. Verbal variations from the phrase of the statute not affecting its substance do not invalidate the sale. *Blake* v. *Rogers*, 210 Mass. 588. The registry of deeds of a county is a public place in the same sense as is a town hall or post office. That fact is not shaken by the failure of the sheriff to characterize it as a public place in his return.

Exceptions overruled.

FORREST W. TAYLOR & others *vs.* FREDERICK J. KENNEDY.

Worcester. October 1, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Landlord and Tenant, Surrender of lease, Eviction. *Evidence*, Presumptions and burden of proof, Relevancy, Self-serving statements. *Pleading, Civil*, Answer. *Set-off*. *Damages*, In recoupment. *Estoppel*. *Practice, Civil*, Amendment.

In an action on a covenant in a lease to pay rent the burden of proof is on the defendant to establish an alleged surrender of the lease.

In an action on a covenant in a lease to pay rent, in which the defence relied upon is an alleged surrender of the lease, where the defendant has introduced evidence of an agreement made in behalf of a proposed corporation to take a lease of the premises for a term of years, the plaintiff properly may be allowed to show that the proposed lease was not to be executed unless the corporation was formed, which never was done, and that the agreement was subject to the existing lease.

In an action on a covenant in a lease to pay rent, where the defence relied upon is an alleged eviction, the plaintiff properly may be allowed to introduce evidence to explain his receipt of rent from a third person in order to show that it raised no presumption of an intention to evict the defendant who never had been ousted.

In the same case it was *held* that certain dealings with the key of the demised premises, while clearly admissible as evidence to show the conduct of the parties, were not conclusive proof of an eviction of the defendant which absolved him from the obligation to pay rent.

In the same case it was *held* that a statement made by the defendant's agent in the absence of the plaintiff that "he had not anything to do with" the demised premises, was excluded properly as a self-serving statement.

In an action of contract no set-off can be allowed to the defendant where he has filed no declaration in set-off.

In an action on a covenant in a lease to pay rent the answer, besides setting up the defences that the lease had been surrendered and that the defendant had been evicted by the plaintiffs, contained an averment "that by reason of the representations and acts of the plaintiffs the defendant is damaged to an amount in excess of the sum which the plaintiffs now claim is due for rent." There was no evidence in support of the alleged claim in recoupment; but it was *said* that, if the averment quoted above was to be treated as a pleading in recoupment, the defendant, while denying that the covenant to pay rent was in force against him, could not rely on alleged breaches by his lessor of covenants in the same lease as a ground for damages.

Where a lessor of land sells and conveys the land subject to the lease, with no reservation of the rent, the grantee by force of the conveyance becomes entitled, as a part of the realty, to receive all rent thereafter accruing, no attorn-

ment being necessary to create privity of estate between the grantee of the lessor and the lessee.

A conveyance of land subject to a lease operates as an assignment of the lease and not merely as a grant of the reversion, and, if the lessee is sued by the grantee of the land on his covenant in the lease to pay rent, he cannot set up in defence an oral agreement between the original lessor and his grantee whereby such lessor is given the right to receive the accruing rent until the end of the term.

In an action by a lessor on a covenant in a lease to pay rent, brought after the lessor had sold and conveyed the leased premises, the plaintiff when the case came on for argument before this court asked leave to amend his declaration under St. 1913, c. 716, § 3, by substituting as plaintiff the grantee of the leased premises. It appeared that the grantee had made a new lease of the premises for sixteen years, subject to the lease sued upon, which he had assigned to his lessee, who had entered upon the premises and had occupied them ever since, and it was *held* that, it never having been determined whether the grantee could maintain the action, the plaintiff must be left to take such further proceedings as he chose to take in the trial court, and accordingly the motion to amend was denied.

CONTRACT on an account annexed under St. 1915, c. 146, § 2, for $1,900 alleged to be due as the rent of a store at 412 Main Street in Worcester according to the terms of a lease in writing dated November 17, 1908, and $17.42 for interest thereon to the date of the writ. Writ dated January 7, 1916.

The answer, among other alleged defences, alleged that the plaintiffs evicted the defendant from the leased premises and that the plaintiffs accepted from the defendant a surrender of his lease.

In the Superior Court the case was tried before *Sanderson*, J., without a jury. He found the facts that are stated in the opinion, and, subject to the defendant's exception, made certain rulings requested by the plaintiffs which are described in the opinion. The defendant asked the judge to make the following rulings:

"1. That on or about March 1, 1915, the lease upon which the plaintiffs' action is founded was surrendered by operation of law.

"2. That between February 22, 1915, and October 1, 1915, the plaintiffs evicted the defendant, to which eviction the defendant assented, and the plaintiffs cannot recover.

"3. That the defendant is entitled to damages by way of set-off to an amount equal to the sum which the plaintiffs claim is due for rent.

"4. That the plaintiffs are estopped from collecting any rent of the defendant."

The judge refused to make any of these rulings. He found that the plaintiffs did not intend to evict the defendant and that they had not either by acts or words evicted him. He also found that the plaintiffs had not accepted a surrender of the lease to the defendant. The judge made a general finding for the plaintiffs and assessed damages in the sum of $2,544. The defendant alleged exceptions.

J. Clark, Jr., for the defendant.

G. S. Taft, for the plaintiffs.

BRALEY, J. The defendant as lessee covenanted to pay the rent reserved during the term, and this obligation generally would continue after as well as before he assigned to the Kenney-Kennedy Company, as he remained liable by privity of contract even if the assignee also became liable through privity of estate. *Way* v. *Reed*, 6 Allen, 364, 368, 369. *Carpenter* v. *Pocasset Manuf. Co.* 180 Mass. 130, 133, 134. It is contended however by him, that his liability has been terminated by either a surrender of the lease or by an eviction by the lessors to which he assented.

"The rule of law, as now settled by the recently adjudicated cases, is, that any acts which are equivalent to an agreement on the part of a tenant to abandon and on the part of the landlord to resume possession of demised premises amount to a surrender of a term by operation of law." *Talbot* v. *Whipple*, 14 Allen, 177, 180. And the defendant has the burden of proof. *Leavitt* v. *Maykel*, 210 Mass. 55. It appears in the findings of fact by the trial judge, that while the defendant and his assignee ceased to occupy the store in the month of August, 1913, "and from that time to the end of the period of the lease were willing to be relieved from liability thereunder," yet they "sublet the store from time to time and paid rent to the plaintiffs until and including the month of February, 1915." During this month the agreement in writing on which the defendant relies as releasing him was executed by one Butler, the duly authorized representative of the estate of the lessors, and the City Trust Company, acting by one Minton, whereby the company was to lease the store for a term of seven years from the first day of March, 1915, leaving the original leasehold a year to run before expiration by limitation. Butler and

Minton, as the judge finds, orally agreed and understood, that, as the company had not been organized, the lease referred to in the agreement was not to be executed unless a charter should be obtained. It is further found that Butler stated to Minton that the agreement was subject to the existing lease "which would have to be cancelled if a new lease was written, and if the old lease was not given up . . . the agreement would be null and void;" and that the lease referred to in the agreement was not to be executed unless the charter should be obtained. The defendant, even if he knew of the written agreement, is not a party to it, and the plaintiffs properly were allowed to show that the instrument was not to become operative unless the corporation was formed, as well as to explain the subsequent receipt by the lessors of rent from Minton during the period of the attempted organization of the company, but which never was chartered, and the acts of one Kenney, who having authority "to act for the defendant in all matters connected with the lease," aided in procuring, and in the collection of rent from a subtenant. *Maionica* v. *Piscopo*, 217 Mass. 324, 328. *Bowes* v. *Christian*, 222 Mass. 359, 362.

The evidence as to all the transactions was admissible also on the issue, as to whether the defendant had been evicted. It is settled that where as in the case at bar the lessee relies on the defence that other tenants have been accepted from whom rent has been collected, the lessor may show, that his acts when explained raise no presumption of an intention to evict, and that in fact the tenant never has been ousted. *Taylor* v. *Finnigan*, 189 Mass. 568, 573, and cases cited. *Cooley* v. *Collins*, 186 Mass. 507, 510. *Skally* v. *Shute*, 132 Mass. 367. The evidence of sending the key of the store to the plaintiffs on January 1, 1916, after the subtenant ceased to occupy, and its return by the plaintiffs to Kenney by whom the key subsequently was tendered to the plaintiff Taylor, who refused to receive it, while clearly admissible, was not conclusive proof of acts absolving the defendant, but incidents only to be considered in connection with the conduct of the parties.

But the statement made by Kenney to the sublessee in the absence of the plaintiffs or their agent, that "he had not anything to do with the store," was a self-serving declaration which was excluded properly.

And the judge's findings, "that the plaintiffs did not intend to evict the defendant and that they have not either by acts or words evicted him," and "that the plaintiffs have not accepted a surrender of the lease to the defendant," having been warranted on the evidence, the defendant's first, second and fourth requests were refused rightly. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89.

Nor could the third request have been given. A short answer is, that the defendant had not declared in set-off as required by R. L. c. 174, § 8. If however the averment in the answer, ". . . the defendant says that by reason of the representations and acts of the plaintiffs the defendant is damaged to an amount in excess of the sum which the plaintiffs now claim is due for rent" is treated as pleading recoupment, there is no evidence to support the claim. The defendant, while he repudiates his express covenant, cannot at the same time rely on it as ground for damages against the lessor. And having been allowed the full benefit of all payments received by the plaintiffs under the arrangement with Minton, he fails to show any ground of complaint. *Deane* v. *Caldwell*, 127 Mass. 242.

The result ordinarily would be that the defendant should be held liable for the remainder of the rent as it accrued. But he also excepted to the giving of the first four requests of the plaintiffs, which in substance were, that although the plaintiffs before the rent accrued for the recovery of which the action is brought sold and conveyed the premises by deed absolute in form, yet they could recover, because under a contemporaneous parol agreement to which the defendant was a stranger, it was agreed between the lessor and the grantee, that the plaintiffs should collect the rent for the remainder of the term and pay it to the grantee. The rulings cannot be supported. The lease was prior to the deed, and the grantee by force of the conveyance which contained no reservation of the rent by the lessor became entitled as part of the realty to receive all rent thereafter accruing. *Burden* v. *Thayer*, 3 Met. 76, 78. It was early decided in this Commonwealth that to constitute privity of estate between the grantee of the lessor and the lessee no attornment was necessary. *Farley* v. *Thompson*, 15 Mass. 18, 25, 26. *Marsters* v. *Cling*, 163 Mass. 477. The grant also operated as an assignment of the lease as well as

a conveyance of the reversion. *McNeil* v. *Ames*, 120 Mass. 481. *McNeil* v. *Kendall*, 128 Mass. 245, 249. And, if sued by the grantee, the defendant could not have escaped payment by pleading and proving the oral agreement, that the plaintiffs and not the grantee should receive the accruing rent until the close of the term. *Patten* v. *Deshon*, 1 Gray, 325. *Russell* v. *Allen*, 2 Allen, 42. *Dunlap* v. *Bullard*, 131 Mass. 161, 163. The grant cannot be cut down, and the estate with all its incidents which vested in the grantee who thereby became the landlord, affected or divested by secret parol agreements to the injury of the defendant, whose subsequent rights as to whom the rent was legally payable, and by whom the landlord's covenants were to be performed, are founded upon it. *Hunt* v. *Thompson*, 2 Allen, 341. *Brockett* v. *Bartholomew*, 6 Met. 396, 399. *Sanders* v. *Partridge*, 108 Mass. 556, 558, 559. *Hammond* v. *Thompson*, 168 Mass. 531, 532, and cases cited. *Noble* v. *Brooks*, 224 Mass. 288, 291. *Montague* v. *Gay*, 17 Mass. 438. R. L. c. 74, § 1, cl. 4.

But, even if the exceptions are well taken, the plaintiffs ask leave to amend under St. 1913, c. 716, § 3, by substituting the grantee as the party plaintiff. The rent declared for on the account annexed now permitted by St. 1915, c. 146, included by stipulation of parties rent for the month of February, 1916, all of which accrued after the conveyance. While the plaintiffs under the parol agreement have paid to the grantee the full amount of rent from the time of his purchase until the lease terminated, their rights to subrogation do not depend on these payments, which in so far as the debt is concerned were purely voluntary, but on the enforceable claims, if any, which the grantee has against the defendant. The grantee having leased the store by indenture on October 1, 1915, for sixteen years from that date, subject to the lease in question, which he assigned to the lessees who apparently at once entered into possession and have since occupied, the question whether the grantee can maintain an action has never been determined. We are accordingly of opinion that the plaintiffs must be left to take such further proceedings in the trial court as they may be advised.

Exceptions sustained.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE vs. ATTORNEY GENERAL & others.

Suffolk. October 15, 1917. — November 27, 1917.

Present: BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Devise and Legacy. Trust, For promotion of applied science, Interpretation.

A testator by a deed of trust, incorporated in and confirmed by a codicil to his will, provided that, after the payment of certain annuities, eighty per cent of the net income of his estate should be accumulated until it amounted to one million dollars and then should be transferred to the President and Fellows of Harvard College, a corporation constituting Harvard University, that thereafter such eighty per cent should be paid over annually until the death of the last annuitant, when the residue of the estate was to be paid over, estimated as to be at that future time about twenty-three million dollars. He provided that the net income of the fund should be used to promote applied science in the manner pointed out by the instrument, and an intention was manifested that not only the investment of the fund but also the education which the fund made possible should be under the control and direction of the university and should be admininistered by it. He provided that, if Harvard University failed to accept the trust, it should go to a new Massachusetts corporation to be organized by the trustees which should receive and apply the endowment "for the purposes and upon the terms above set forth in respect to said gift to Harvard College." Harvard University accepted the trust and undertook to make with the Massachusetts Institute of Technology, here called the institute, an agreement whereby three fifths of the income of the endowment fund were to be devoted to an engineering school which should be carried on at the institute and be controlled and conducted by the institute, vesting practically in the institute the substantial organization, control, direction and administration of the work to be done under the agreement. Upon a bill in equity filed by the President and Fellows of Harvard College for instructions, it was *held,* that the proposed agreement was not authorized by the terms of the trust and could not be carried out lawfully by means of the funds received under the deed of trust and the codicil in question.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 28, 1915, and amended on November 21, 1916, by the President and Fellows of Harvard College, a corporation, for instructions as to whether the plaintiff lawfully might carry out a certain agreement between the plaintiff and the Massachusetts Institute of Technology, a corporation, which was approved finally and went into effect on March 1, 1915, so far as respected the property

received by the plaintiff under the deeds of trust and the will of Gordon McKay, who died, resident at Newport in the State of Rhode Island, on October 19, 1903.

The will of Gordon McKay was dated December 1, 1887. By a second codicil dated November 5, 1891, the testator confirmed a deed of trust dated October 30, 1891, recited in that codicil as follows:

"I, Gordon McKay of Newport, in the State of Rhode Island, in exercise of the powers reserved by me in a certain Instrument dated November 30th, A. D. 1887, conveying certain property in trust to Frank F. Stanley, Trustee, and in a certain supplementary Instrument of Trust dated January 30th, A. D. 1891, the two forming one instrument, do hereby direct and provide as follows:

"I appoint William Minot, Junior, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, Counsellor-at-law, to be one of the Trustees under said Instrument, of which this instrument is also a part, to act after my decease in place of Elias Merwin, deceased.

"The house which my Trustees are directed to provide for Marion McKay is already provided, and now stands in the name of said Stanley as Trustee.

"I revoke all the provisions for the accumulation of three hundred thousand dollars, and the use of a certain estate number twenty-four Arrow Street (which I have sold) for the purpose of establishing and maintaining a home for deserving indigent females. I direct that said sum of Three hundred thousand dollars shall not be accumulated for that purpose, but shall form part of the accumulation to be applied as an endowment for a School of Art as hereinafter provided.

"I revoke all the provisions in said Trust Instrument for the accumulation of income to establish, and for the endowment, maintenance, government and regulation of a School of Art, and I substitute therefore the following provisions.

"I direct that eighty per cent of the balance of said net annual income after paying the annuities (the remaining twenty per cent being held as a reserved fund to cover any future possible deficiency in the annual income to pay said annuities) shall be safely invested by my trustees from time to time until such accumulations amount to the sum of one million dollars and then

I direct my trustees to pay over said sum of one million dollars to 'the President and Fellows of Harvard College in their corporate capacity,' if said Corporation shall accept the same for the purposes and upon the terms and conditions hereinafter set forth: to be held and applied by them and their successors in said capacity for the purposes and trusts hereinafter declared.

"I also direct said trustees to pay to the said President and Fellows (if and after said sum of one million dollars has been paid over to them as aforesaid) annually eighty per cent of the balance of the net income accruing from the remainder of my estate after paying the existing annuities and upon and after the death of the last surviving annuitant, I direct said Trustees to pay over to the said President and Fellows of Harvard College all the residue of my estate including all unexpended income, all of which said sums, I give to the said President and Fellows of Harvard College, provided they accept the same as aforesaid strictly upon the trusts and for the purposes following, namely:

"I direct, if the said Corporation, the President and Fellows of Harvard College accept said gift, that the sum total of all the property and moneys conveyed by my trustees to the President and Fellows of Harvard College, shall be forever known and described in the records of the President and Fellows and on the books of their Treasurer as the Gordon McKay Endowment.

"I give the President and Fellows full powers to hold, manage and protect, improve, sell, invest and re-invest at their discretion from time to time the property in which this Endowment may at any time be invested: I also give the said Corporation authority, in case the principal shall be at any time impaired through misfortune, to accumulate the income of the Endowment, or any part thereof, until the principal shall be made good: but in order that the principal and income may share in the guaranty or insurance which is derived from the large mass and wide distribution of the University's investments, I prefer that the investments of the Endowment be merged, as soon and as far as in the discretion of the President and Fellows they prudently and equitably may be, with the general investments of the other permanent funds held by the President and Fellows.

"The net income of said Endowment shall be used to promote applied science:

"*First.* By maintaining professorships, workshops, laboratories and collections for any or all of those scientific subjects, which have, or may hereafter have, applications useful to man and

"*Second.* By aiding meritorious and needy students in pursuing those subjects.

"Inasmuch as a large part of my life has been devoted to the study and invention of machinery, I instruct the President and Fellows to take special care that the great subject of mechanical engineering in all its branches and in the most comprehensive sense, be thoroughly provided for from my Endowment.

"I direct that the President and Fellows be free to provide from the Endowment all grades of instruction in applied science, from the lowest to the highest, and that the instruction provided be kept accessible to pupils who have had no other opportunities of previous education than those which the free public schools afford.

"I direct that the salaries attached to the professorships maintained from the Endowment be kept liberal, generation after generation, according to the standards of each successive generation, to the end that these professorships may always be attractive to able men and that their effect may be to raise, in some judicious measure, the general scale of compensation for the teachers of the University.

"I direct that the professors supported from this Endowment be provided with suitable assistance in their several departments by the appointment of instructors of lower grades, and of draughtsmen, foremen, mechanics, clerks or assistants, as occasion may require, my desire being that the professors be free to devote themselves to whatever part of the teaching requires the greatest skill and largest experience, and to the advancement of their several subjects.

"I direct that the President and Fellows be free to erect buildings for the purposes of this Endowment, and to purchase sites for the same, but only from the income of the Endowment.

"I direct that all the equipment required to illustrate teaching or to give students opportunity to practice, whether instruments, diagrams, tools, machines or apparatus, be always kept of the best design and quality, so that no antiquated, superseded, or unserviceable implement or machinery shall ever be retained in the

lecture rooms, workshops or laboratories maintained from the Endowment.

"Finally, I request that the name Gordon McKay be permanently attached to the professorships, buildings, and scholarships or other aids for needy students, which may be established, erected or maintained from the income of this Endowment.

"Should the said President and Fellows of Harvard College fail to accept (in writing) the above Endowment upon the terms and provisions above set forth within two years after my death, I then give said accumulations and said residue to my trustees hereunder and their successors, in trust to apply the same to the purposes above set forth.

"And for this purpose I direct them to select suitable associates and form a corporation in, and under the laws of, and if need be under a special charter to be obtained from the legislature of the Commonwealth of Massachusetts, to receive, hold, manage and apply said Endowment by means of an establishment at some place within said Commonwealth for the purposes and upon the terms above set forth in respect to said gift to Harvard College.

"In further trust to transfer to said Corporation when formed the said accumulations and residue in the manner and at the times above prescribed for the payment thereof to the President and Fellows of Harvard College.

"In further trust, to the end that said fund shall be applied according to my intention, in case of any insuperable difficulty by reason of any change, in time to come in the laws of the said Commonwealth or otherwise in forming such a corporation, then to dispose of the same as a public charity by transfer to some existing corporation or otherwise, in such manner as under the consideration and order of the Supreme Court of Massachusetts shall effect or most nearly effect my above declared intention and purpose.

"I direct my Trustees hereunder to provide for the proper care and maintenance of the McKay burial place in the Pittsfield Cemetery in Massachusetts, and of the tomb now there or which I may hereafter erect or substitute, and I charge the ultimate recipient of the fund hereunder with the care and maintenance of the same from the time of the first transfer to it forever.

"In witness whereof, I hereunto set my hand and seal on this thirtieth day of October, A. D., 1891. Gordon McKay."

On October 31, 1904, the President and Fellows of Harvard College accepted the trust by the following vote:

"Voted, Whereas Gordon McKay of Newport in the State of Rhode Island in his lifetime executed certain instruments of trust, and also executed a will and codicils, in which will and codicils were contained copies of said instruments and by which will and codicils said instruments were confirmed; and Whereas said Gordon McKay, subsequently deceased; and his said will and codicils have been duly proved and allowed; and Whereas said Gordon McKay, by said instruments of trust and said Will and codicils did give, devise and bequeath to and for the benefit of the President and Fellows of Harvard College, in their corporate capacity, certain sums and also the residue of his estate strictly upon the trusts, conditions and terms and for the purposes set forth and directed in said instruments, will and codicils:

"Now, Therefore, said President and Fellows of Harvard College, in their corporate capacity, on this thirty-first day of October, 1904, being within two years of the death of said Gordon McKay, do gratefully accept such gifts, devises and bequests strictly upon the trusts, conditions and terms and for the purposes in said instruments, will and codicils set forth and directed, to be held and applied by said President and Fellows, in their corporate capacity, and their successors in said capacity, for the said purposes and trusts."

The agreement between the plaintiff and the Massachusetts Institute of Technology, in regard to the validity of which instructions were sought, was as follows:

"In this agreement, 'the Institute' means the Massachusetts Institute of Technology, and 'the University' means Harvard University. It is understood that any action of the President and Fellows of Harvard College shall require the consent of the Board of Overseers wherever such consent is necessary under the laws governing the University.

"I. The University and the Institute shall be unaffected in name, organization, title to and rights over property, except that

the University is hereby given whatever rights and interests are necessary to secure to the students of the University the educational opportunities and advantages meant to be acquired for their benefit under the operation of this agreement. For the purpose of keeping in touch with the actual operations of the School the President of the University may from time to time visit the School, examine the plant, and familiarize himself with its methods and workings.

"II. The University and the Institute shall coöperate in the conduct of courses leading to degrees in Mechanical, Electrical, Civil and Sanitary Engineering, Mining and Metallurgy, and in the promotion of research in those branches of Applied Science. The courses and research shall be conducted in accordance with the provisions of this agreement and on the site in Cambridge recently acquired by the Institute bordering on Massachusetts Avenue and the Charles River Embankment or on any other site that may be agreed upon should future conditions render an extension or change of site desirable.

"III. Subject to the reservations hereinafter set forth the University shall devote to the purposes referred to in Section II the net income of all funds that are credited on its books to the Lawrence Scientific School; also the use of all machinery, instruments, and equipment that are suited to these purposes and that the University does not in its opinion need more urgently for other purposes; also not less than three-fifths of the net income of the Gordon McKay Endowment; also the income of all property that it may acquire hereafter for the promotion of education or research in the branches of Applied Science referred to in Section II; also such further sums as it may from time to time feel able to contribute.

"IV. Subject to the reservations hereinafter set forth, the Institute shall devote to the purposes referred to in Section II all funds, or the income of all funds, that it now holds or hereafter acquires for the promotion of education or research in the branches of Applied Science mentioned in that section, and in addition to this as much of the funds, or the income of funds, that it holds for general purposes as is not in its opinion more urgently required for other purposes.

"V. Students' fees for courses in the branches of Applied Science mentioned in Section II shall be devoted to the purposes

referred to in that section. These fees shall for the first ten years be deemed to be contributed by the two institutions in the proportion of the numbers of the students following these courses in the Institute and in the University's Graduate Schools of Applied Science, respectively, during the year 1913–14. At the end of ten years a different arrangement shall be made, if, in the opinion of the two Corporations, it appears to be more equitable. The fees of students pursuing courses in the subjects referred to in Section II in the University's Graduate Schools of Applied Science at the time when this agreement is adopted shall be unaffected by any change brought about by this agreement. For all other students the amount of the fees for complete courses leading to those degrees of the Institute and of the University that are granted through the operation of this agreement shall be $250 per annum until changed by agreement between the two Corporations. The amount of fees for partial courses and for research shall be determined as may be agreed upon from time to time.

"VI. The funds available for education and research in the branches of Applied Science referred to in Section II shall be expended through the Bursary of the Institute in the payment of salaries, the maintenance of scholarships, the care of grounds, and the erection and maintenance of buildings and equipment or otherwise as may be agreed upon from time to time, it being expressly provided that all proposed appropriations shall be approved by the Corporation that supplies the funds, and that buildings shall be erected only from the share of the funds supplied by the Institute.

"VII. All members of the Instructing Staff in the departments of Mechanical, Electrical, Civil and Sanitary Engineering, Mining and Metallurgy, who give instruction in courses leading to the degrees both of the University and of the Institute, shall be appointed and removed by the Corporation that pays their salaries after consultation with the other Corporation.

"VIII. All students registered at the Institute in the various numbered professional courses covered by Section II that lead to degrees of the University shall be eligible for those degrees, provided they satisfy the conditions prescribed by the University, and they shall be entitled to the same rights and privileges as students in the professional schools of the University.

"IX. The President or Acting President of the Institute shall be the executive head for all the work carried on under this agreement and for that purpose shall be the agent of the University as well as of the Institute and shall annually report to both Corporations. When any future President or Acting President is to be selected, the President or Acting President of the University shall be invited to sit with the committee that recommends the appointment of a President or Acting President to the Corporation of the Institute.

"X. As soon as this agreement goes into effect, the Faculty of the Institute shall be enlarged by the addition thereto of the professors, associate professors, and assistant professors of Mechanical, Electrical, Civil and Sanitary Engineering, Mining and Metallurgy, in the University's Schools of Applied Science. These persons shall acquire the titles and privileges of the same rank in the Institute while retaining their titles and privileges in Harvard University, and the terms and conditions of their employment and their salaries shall be unaffected by the change. The professors, associate professors, and assistant professors of the Institute in the departments of Mechanical, Electrical, Civil and Sanitary Engineering, Mining and Metallurgy, shall acquire the titles and privileges of the same rank in Harvard University while retaining their titles and privileges in the Institute, and the terms and conditions of their employment and their salaries shall be unaffected by the change. All professors, associate professors, and assistant professors appointed under the operation of Section VII shall have the titles and privileges of professors of the University and of the Institute, including the right to benefit from the pension systems of both institutions.

"Additions to the Faculty of the Institute shall be made by the appointment of professors, associate professors, or assistant professors under the operation of Section VII, or by the Corporation of the Institute for other purposes. The Faculty constituted as indicated above shall, subject to such directions as may be given by the Corporation of the Institute, prescribe the courses and conditions of entrance thereto leading to all degrees granted by the Institute. The same Faculty shall, subject to such directions as may be given by the Corporation of the University, prescribe the courses and conditions of entrance thereto leading to all de-

grees granted by the University under the operation of this agreement.

"XI. Degrees shall be conferred by the Institute and by the University acting separately on the recommendation of the Faculty referred to in Section X.

"XII. It is expressly provided that, as regards the funds and property of the University and of the Institute respectively referred to in Sections III and IV, this agreement shall be subject to any special terms and requirements upon which such funds and property may be held; and any property or funds that may be held at any time by either Corporation under such terms and restrictions as would prevent their use precisely as is indicated in this agreement, shall, nevertheless, be used by the two Corporations respectively for the support, benefit or encouragement of a coöperative effort in the field of education and research in engineering and mining in such manner as may be permissible or in accordance with the trusts upon which they may be held.

"XIII. Whereas, doubts might arise as to the legal effect of an omission from this agreement of any provision for its termination, it is hereby provided that the agreement may be terminated either by the University or by the Institute, but that no termination shall be made except upon notice from one party to the other of at least five years unless a shorter time be mutually agreed upon.

"XIV. This agreement shall take effect when finally adopted and approved by the Corporation and Board of Overseers of the University and the Corporation of the Institute; and the coöperation referred to in Section II shall begin when the Institute is ready to open courses in Engineering and Mining on the site in Cambridge mentioned in that Section."

The case was heard by *Pierce*, J., upon the pleadings, and the evidence submitted by the parties. With the consent of the parties the single justice reported the case with the evidence, the rulings thereon and all questions of law in the case for determination by the full court.

C. F. Choate, Jr., (*F. T. Field* with him,) for the plaintiff.

J. G. Milburn of New York, (*H. Wheeler, A. Marshall & H. E. Warner* with him,) for the trustees under the deed and will of Gordon McKay.

DE COURCY, J. The question presented by this bill for instructions is whether the plaintiff corporation lawfully can carry out an agreement, duly made by it with the Massachusetts Institute of Technology, "as far as respects the property received by it under the deeds of trust and the will of Gordon McKay."

The agreement (above set forth in full) assumed its final form in February, 1915. Speaking generally, it purports to establish a co-operative arrangement between Harvard University and the Institute "in the conduct of courses leading to degrees in Mechanical, Electrical, Civil and Sanitary Engineering, Mining and Metallurgy, and in the promotion of research in those branches of Applied Science." To the maintenance of the plan the University agrees to devote, in addition to other income and equipment, "not less than three-fifths of the net income of the Gordon McKay Endowment."

On analyzing the material provisions of the plan, and considering them in their practical application, we are led to certain salient conclusions as to what the agreement accomplishes: Education and research in the five branches covered by the agreement are to be transferred from the University to the Institute, and there conducted under the provisions of the agreement as part of the latter's curriculum. The Harvard professors associated with those courses shall become members of the faculty of the Institute, and the property and equipment which the University may hold for the promotion of instruction in industrial science shall be devoted to the courses as so conducted. All students who take these engineering courses are to register at the Institute only, and pass under its jurisdiction. It seems to us that they will become a part of its complete and distinct life, even though they are entitled to make use of the museums, libraries and playgrounds of the University, and to receive the degree of both institutions on completing any of the engineering courses. The faculty which determines the conditions of entrance, prescribes the courses that lead to degrees, largely shapes and carries into practical application the instruction and discipline of the school, and mainly influences the appointment of professors, is the faculty of the Institute, notwithstanding that fourteen of its one hundred and twenty members come from the University. The president of the Institute is made the executive

head of all the work carried on under the agreement. The amendment that he "for that purpose shall be the agent of the University as well as of the Institute" does not in fact enlarge the control of the University. The relation of the president of the Institute to the work is the relation of the Institute itself. Finally, the funds available for carrying out the plan are to be expended through the bursary of the Institute. And although "all proposed appropriations shall be approved by the Corporation that supplies the funds," that apparently leaves little real power in the University, as the total expenses of the school for any academic year are a fixed quantity, and the total contribution of the University is settled by the agreement. Considered as a whole, the plan appears practically to vest in the Institute the substantial organization, control, direction and administration of the work to be done under the agreement, and to commit to the Institute the money of the McKay endowment, and the work of planning and carrying out the engineering education provided thereby. In substance, it devotes three fifths of the income of the endowment to an engineering school, which is not only located at the Institute, but is conducted and controlled by the Institute instead of by the University. We cannot assent to the assertion of counsel that "the school of applied science on the Charles River embankment is a Harvard school, a department of Harvard University."

The Attorney General has not raised any question of *ultra vires*, and we assume that the University legally may use its general funds to carry out the agreement in question. There is no occasion here for the application of the *cy pres* doctrine because admittedly the trust can be administered. It may be assumed also that a co-operative plan like that proposed would be advantageous to both of these great institutions by creating one school of applied science of the highest efficiency, with economy in expenditure and effort, to take the place of two competitive schools. But so far as the agreement attempts to dispose of the income of the McKay gift, the controlling question is whether it is authorized by the terms and conditions of the trust upon which the gift was made and accepted. The income of the McKay endowment must be administered according to the intention of the founder, Gordon McKay, even though it be at variance with our views of policy or expediency. And that intention is to be gathered from the

trust instrument itself, read in the light of the attendant circumstances known to him, or reasonably presumed to have been contemplated by him at the time it was made. *Jackson* v. *Phillips*, 14 Allen, 539, 592. *Crapo* v. *Pierce*, 187 Mass. 141. *Crawford* v. *Nies*, 224 Mass. 474, 490.

The effective instrument is the deed of trust executed October 30, 1891, and confirmed by a codicil November 5, 1891. McKay was then seventy years of age. He had been a successful manufacturer and inventor of machinery. He was a man of artistic tastes, a lover of music, and had travelled extensively in Europe. From 1864 or 1865 for more than twenty years his home was in Cambridge, near the college yard; he took a leading part in supporting the Symphony concerts in Sanders Theatre, and was brought into friendly relations with many of the college teachers and students. He appreciated the advantage of combining training in the exact sciences with liberal culture in the atmosphere of the University. During all those years there was a close personal intimacy between him and the late Professor Shaler, long connected with the University, and appointed Dean of the Lawrence Scientific School in 1891; and with the latter McKay discussed his schemes for the disposition of his fortune. By his earlier trust deed of November 30, 1887, he gave $300,000 and his house in Cambridge to establish a home for deserving indigent females, and the residue of his estate to the University in trust for the establishment and maintenance of a separate school for instruction in the industrial arts and sciences, to be designated as the McKay School of Art; but these plans he abandoned in the deed of 1891. This later deed he never substantially changed during the remaining twelve years of his life, notwithstanding the negotiations of 1897–98 between the University and the Institute respecting a combined engineering school. He was familiar with the rapid development of the Lawrence Scientific School between 1891 and 1903 (the year of his death), and was accustomed to refer to it as "his school," when questioning Dean Shaler as to its condition.

In the light of this knowledge of McKay's personality and history we examine the effective deed of trust of October 30, 1891. He first provides the funds for the Gordon McKay Endowment. In brief, after the payment of certain annuities, eighty

per cent of the net income of his estate is to be accumulated until it amounts to one million dollars, and then transferred to the plaintiff. Thereafter such eighty per cent is to be paid over annually until the death of the last annuitant, when the residue of the estate is to be paid. In passing it may be said that the trustees of the McKay estate paid the one million dollars to the University in 1909, and have paid the subsequent annual income up to January 1, 1917, amounting to $1,247,261.12. The income of these combined payments at four and a half per cent would be $101,126.75, and it will increase each year by reason of the annual payments to the University above mentioned. According to the computations of the actuary the probable date of the death of the last survivor of the annuitants is January 1, 1956. It is estimated that the capital of the endowment at that time will be $22,948,899.20.

After providing for the investment of the endowment he sets forth the main trust and purpose as follows: "The net income of said Endowment shall be used to promote applied science:

"*First*, By maintaining professorships, workshops, laboratories and collections for any or all of those scientific subjects, which have, or may hereafter have, applications useful to man and

"*Second*, By aiding meritorious and needy students in pursuing those subjects."

He adds, "Inasmuch as a large part of my life has been devoted to the study and invention of machinery, I instruct the President and Fellows to take special care that the great subject of mechanical engineering in all its branches and in the most comprehensive sense, be thoroughly provided for from my Endowment.

"I direct that the President and Fellows be free to provide from the Endowment all grades of instruction in applied science, from the lowest to the highest, and that the instruction provided be kept accessible to pupils who have had no other opportunities of previous education than those which the free public schools afford." Directions are given as to details, such as the salaries of professors, providing them with suitable assistance, and ensuring modern equipment of the best design and quality. He directs that the President and Fellows be "free to erect buildings for the purposes of this Endowment, and to purchase sites for the same, but only from the income of the Endowment." Then follows:

"Finally, I request that the name Gordon McKay be permanently attached to the professorships, buildings, and scholarships or other aids for needy students, which may be established, erected or maintained from the income of this Endowment." He inserted the further significant provision that, in the event of the failure of the University to accept the trust, the gift should go, not to any other existing institution, but to a new Massachusetts corporation which should be established to receive and apply the endowment "for the purposes and upon the terms above set forth in respect to said gift to Harvard College."

Reading this instrument in the light of the circumstances already referred to, it seems reasonably clear from its express provisions and implied limitations that Mr. McKay intended that not only the investment of the endowment funds but the education which his endowment was to make possible should be under the control and direction of the University, its government and administration. He selected as the trustee to carry out his purposes a great educational institution, one with whose ability adequately to carry out his plans he was familiar, and with whose historic name he desired to associate his own in perpetual memory.

In our opinion this intention of Gordon McKay is not in fact carried out in the agreement in controversy, as we have construed its provisions in their practical operation. As was said by this court in *Harvard College* v. *Society for Promoting Theological Education*, 3 Gray, 280, 301, in dismissing the suggestion that the trust fund might be held by the college, and the income paid over to and applied by a separate school: "We find no authority for adopting such a scheme for these charities, finding the trust to embrace the higher duty of supervision of the administration of these funds, and the mode of their application; and the purpose of the donors being such as we have stated." See also *Winthrop* v. *Attorney General*, 128 Mass. 258; *Cary Library* v. *Bliss*, 151 Mass. 364; *Boston* v. *Doyle*, 184 Mass. 373, 381.

What has been said disposes of the only question now before us for decision (aside from the rulings as to evidence, wherein we find no error), and it would be unwise as it is unnecessary to attempt to define in advance what particular administrative methods may legally be adopted by the University in carrying out the trust.

We are constrained to instruct the plaintiff that it cannot lawfully carry out this agreement between it and the Institute, as far as respects the property received by the University under the deeds of trust and the will of Gordon McKay.

Decree accordingly.

STATE STREET TRUST COMPANY & another, trustees, *vs.* GEORGIANNA T. SAMPSON & others.

Suffolk. October 16, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Devise and Legacy. Words, "Right heirs at law," " Heirs," "Then."

The residuary clause of a will provided for the division of the residue of the testator's estate into nine equal shares, one for the benefit of each surviving child and one for the issue of each deceased child taking by right of representation. Each child was to receive the income of one share during his life. The clause contained this provision: "And upon the decease of either of said sons or daughters leaving no issue then said Trustees shall pay over and convey the whole of the trust share and estate of such deceased son or daughter to my right heirs at law." Twenty-five years after the death of the testator one of the daughters of the testator died, leaving no issue. *Held,* that the words "my right heirs at law," as used in the sentence quoted above, meant those sons and daughters of the testator and the issue of any deceased child who were living at the time of the testator's death.

BILL IN EQUITY, filed in the Supreme Judicial Court on December 30, 1916, by the trustees under the will of Samuel A. Walker, late of Nahant, who died on May 23, 1880, for instructions.

The case came on to be heard before *Crosby,* J., who at the request of the parties reserved it upon the bill and the answers thereto for determination by the full court. The essential facts disclosed by the record are stated in the opinion.

The case was submitted on briefs.

A. H. Russell, E. M. Moore & T. H. Russell, for the plaintiffs (stating the case).

A. F. Converse, for the defendants Georgianna T. Sampson and others.

R. Spring, for the defendants Fannie S. Walker and another.

RUGG, C. J. This is a bill for instructions as to the disposition

of a fund held by trustees under the will of Samuel A. Walker, who died in 1880. By the fourteenth article of that will the residuum of the estate was given to trustees for the benefit of children of the testator and the issue of a deceased daughter. The estate was to be divided into equal shares, one for the benefit of each surviving child and one for the issue of each deceased child taking by right of representation. The estate accordingly was divided into nine shares. The will contained specific directions as to the distribution of the income of the several shares held for the benefit of the children, which are not material in this connection. The clause in the will now operative, as to the meaning of which instructions are sought, is in these words: "Upon the decease of either of said sons or daughters, leaving issue, then said Trustees shall pay over and convey the whole of the trust share and estate of such deceased son or daughter, to the child or children of him or her so dying, absolutely, the issue of any deceased child to take its parent share. And upon the decease of either of said sons or daughters leaving no issue then said Trustees shall pay over and convey the whole of the trust share and estate of such deceased son or daughter to my right heirs at law."

One of the daughters of the testator deceased in 1915, leaving no issue. The questions to be determined are, first, the meaning of the words "my right heirs at law," and, second, the time as of which such heirs are to be ascertained.

1. Whatever may be the signification of the words "right heirs at law" under other circumstances, (as to which see *Peabody* v. *Cook*, 201 Mass. 218, and cases cited, *Boston Safe Deposit & Trust Co.* v. *Blanchard*, 196 Mass. 35, 40, and cases collected in Note, 16 Ann. Cas. 298, 299,) plainly in the case at bar they can mean only those heirs at law who are heirs by blood. Whatever may be the time as of which such heirs are to be ascertained, they are in any event children and the issue of deceased children of the testator.

2. It is the general rule that a bequest or devise to the heirs or the heirs at law of a testator is to be construed as referring to those who are such at the time of the death of the testator, unless a different intent is plainly manifested by the will. That was settled by *Abbott* v. *Bradstreet*, 3 Allen, 587, and has been followed

consistently since that decision. There are many cases. The following are only illustrative of a large class: *Jewett* v. *Jewett*, 200 Mass. 310; *Welch* v. *Blanchard*, 208 Mass. 523; *Blume* v. *Kimball*, 222 Mass. 412. That rule is founded on the natural meaning of the words. Speaking in a popular as well as in the strictly accurate sense, the word "heirs" means those persons who inherit the property of a person at the time of his death. *Whall* v. *Converse*, 146 Mass. 345.

There are no words in the present will which disclose a different design. On the contrary, it is apparent from the terms of article thirteen that the testator knew how to express a purpose to make his benefaction of advantage to those living at a future time. It there is provided that a trust fund is to be distributed at the decease of his wife among his "children, then living, and to the issue of any deceased child . . . by right of representation." The word "then" in that context refers unmistakably to the death of the wife as the date for ascertaining the beneficiaries. The same word in the clause now under consideration refers to the time for distribution and not to the time for ascertaining who might be the hypothetical heirs of the testator. The case at bar is indistinguishable from *Dove* v. *Torr*, 128 Mass. 38, and the numerous cases which have followed it.

It is not necessary to review decisions where the words of the testator have manifested a purpose to distribute his estate among an artificial class of persons, who would have been his heirs if he had died at a time later than his actual decease. They all are plainly distinguishable. The principles which govern the case at bar are fully discussed in the authorities already cited and need not be repeated. The petitioners are instructed that the words "right heirs at law" of the testator used in the sentence quoted from clause fourteen, mean those sons and daughters of the testator and the issue of any deceased child living at the decease of the testator.

Decree accordingly.

JOHN T. REGAN *vs.* WILLIAM J. CUMMINGS.

Suffolk. October 16, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence. Motor Vehicle. Proximate Cause.

Where one operating a motor car heard the blowing out of one of the tires of the car and instantly knew that the metal locking ring attached to the collapsed tire might come off if he continued to run the machine, instead of stopping the car almost instantly, as he might have done, let it run on for at least twenty feet, when the locking ring came off and, rolling across the street, struck and injured a traveller on the sidewalk, in an action by the traveller against the owner of the car, whose servant was operating it, for his injuries thus sustained, there is evidence for the jury that the plaintiff's injuries were caused by the negligence of the defendant's servant.

Where one has been guilty of a negligent act which he knew was likely to cause harm to some person, he or his employer is none the less liable for an injury caused by the negligent act because he could not have foreseen the precise thing that happened.

TORT for personal injuries sustained on May 28, 1914, by being struck by a locking ring that came from the wheel of a motor car that was being operated by a servant of the defendant, when the plaintiff was travelling on foot on the sidewalk of Park Street in the part of Boston called Charlestown. Writ dated June 24, 1915.

In the Superior Court the case was tried before *Stevens*, J. The substance of the evidence is described in the opinion. One Ireland, the chauffeur of the defendant, who was driving the car at the time of the accident, testified, on his cross-examination, "that he heard a noise in the back of the machine and felt the machine going along with the usual noise and irregularity that there is when a tire has gone flat, and then he looked out and saw that the tire on the right rear shoe was blown out, and he did not notice the plaintiff at the time; that from the time he heard the blow-out until he stopped the machine he went about twenty feet; that he was going at the time about six or eight miles an hour; that he could have stopped his machine almost instantly; that the pieces of iron came off after the tire went flat and after

the machine had gone three or four feet, not at the same time as the blow-out, but as soon as the tire went flat so that they could release themselves; that a ring will often come off when a tire goes flat; that he has known of them to run some distance at other times before they will come off; that he never knew of one coming off instantly with the tire blowing out; that the part that loosens first and comes out from the rim is the part of the ring without the tip on it, and as the wheel continues to go round it has a tendency to loosen the rest of the ring until it loosens it round as far as the tip; that he must have gone at least the whole round of the wheel after the tire became flat after the blow-out before the rings could come off; that he knew the minute he had the blow-out that if he continued to run his machine the rings might come off; that he did not stop immediately after the blow-out occurred, but went for some twenty feet; that he could have stopped practically as soon as he heard the blow-out by pushing on the foot brake; but he did not do it; that he thought that it would take more than one revolution of the wheel to loosen up the rings so that they would come off."

The judge stated that he saw no evidence of negligence on the part of the defendant and ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

J. F. McDonald & J. M. Graham, for the plaintiff.

F. J. Daggett, J. T. Cassidy & P. Mansfield, for the defendant.

PIERCE, J. This is an action of tort to recover damages for personal injuries sustained on May 28, 1914, by the plaintiff while walking on the sidewalk of a public street, by reason of being struck by a "locking ring" which came from a wheel of an automobile owned by the defendant and operated by a servant of the defendant, who was at the time of the accident engaged in the business of the defendant. At the close of the evidence the presiding judge directed a verdict for the defendant, and the plaintiff excepted.

Making every reasonable assumption in favor of the plaintiff, *Shea* v. *American Hide & Leather Co.* 221 Mass. 282, the jury would have been warranted in finding that the plaintiff while in the exercise of due care was struck, and received pecuniary harm, by a locking ring of the defendant's automobile, which had rolled

across the street to the sidewalk upon which the plaintiff was travelling; that the locking ring was of metal and of the circumference of an ordinary automobile wheel; that the locking ring is split; that on the locking ring there is a point which fits into a hole in the rim; that inside the locking ring there is another ring which fits over the shoe; that the locking ring locks the inner ring into the shoe when the tire is pumped up; that the function of the rings is to hold the shoe on the wheel in place; that immediately preceding the accident the operator heard the noise of a tire blow-out; that he heard the usual noise and felt the usual irregularity of motion there is when a tire has gone flat; that upon hearing the blow-out the operator did not look to see whether the tire was flat until a flat tire was indicated by the usual noise and irregularity which is attendant upon that condition; that the operator knew the minute he had a blow-out that the rings might come off if he continued to run the machine; that he could have stopped his car almost instantly; that the tire would not have become sufficiently flat to have released the rings had the car been stopped immediately after the blow-out occurred, and that the operator did not stop at the time of the blow-out but went at least twenty feet thereafter. On the foregoing facts the jury would be justified in finding that the operator was negligent in not stopping the car in season to have prevented the release of the rings.

The contention of the defendant that the injury was too remote and that the negligence of the defendant was not the direct and proximate cause of the plaintiff's injury, is unsound. It is sufficient that it appears that the negligence of the defendant would probably cause harm to some person even though the precise form in which it in fact resulted could not have been foreseen. *Burnham* v. *Boston & Maine Railroad*, 227 Mass. 422, 426.

Exceptions sustained.

SAMUEL BROWN *vs.* JAMES LEARMOUTH.

Suffolk. October 16, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Municipal Court of the City of Boston. Practice, Civil, Findings of fact, Requests for rulings, Rules of court, New trial. *Mortgage,* Of real estate: foreclosure. *Notice.*

A finding of a judge of the Municipal Court of the City of Boston, reported to the Appellate Division, that there was a default in the payment of the principal and interest of a certain mortgage, cannot be said as matter of law to have been unwarranted, where all the evidence is not reported.

Under R. L. c. 187, § 14, which requires that notice of a foreclosure sale under a mortgage shall be published "in a newspaper, if any, published in the city or town in which the land lies; otherwise, in a newspaper published in such county," a publication in a newspaper published in the town which is the county seat of the county in which the land lies is sufficient, although the land does not lie in that town and although there is a newspaper which purports on its title page to be published in a part of the town where the land lies and has a circulation therein, if such newspaper is in fact published in another town in another county and a warranted finding is made that no newspaper is published in the town in which the land lies.

Under Rule 37 of the Municipal Court of the City of Boston, which requires that "Requests for rulings in the trial of causes shall be in writing and presented to the court before the closing arguments unless special leave is given to present further requests later," it is for the trial judge to determine whether the rule has been complied with, and where his decision on this matter has been affirmed by the Appellate Division, it is not open to question in this court.

A judge of the Municipal Court of the City of Boston, who after hearing a case had found for the defendant and had denied a motion of the plaintiff for a new trial, made the following report to the Appellate Division: "I hereby report the court's order denying the plaintiff's motion to the Appellate Division for its determination, if I have the power to make such report." On an appeal from an order of the Appellate Division dismissing the report, it was *said* that, even if the judge's action in reporting his denial of the motion for a new trial gave the Appellate Division jurisdiction of the question, the motion was addressed to the discretion of the trial judge and there was no ground for questioning its proper exercise by him.

TORT, with a declaration in two counts, each for the same cause of action, to recover $2,000 damages for an alleged wrongful exercise of a power of sale contained in a mortgage in a foreclosure sale on May 31, 1915, of certain real estate of the plaintiff in the town of Medway in the county of Norfolk, it being alleged that

there had been no breach of condition at the time of the foreclosure sale and also that the statutory requirements were not complied with. Writ in the Municipal Court of the City of Boston dated September 6, 1916.

The judge of the Municipal Court made the following special findings and rulings:

"1. I find that at the time of the foreclosure sale the plaintiff was the owner of the equity of redemption of the premises referred to in the declaration.

"2. That when foreclosure proceedings were instituted there was a default in the payment of the principal sum mentioned in the condition of said mortgage.

"3. That there is no newspaper published in the town of Medway; that there is a newspaper, the West Medway Gazette, which is published in Milford in the county of Worcester, but which purports on its title page to be published in West Medway, a part of said town of Medway and which has a circulation therein.

"4. That notice of said foreclosure sale was not published in said West Medway Gazette, but was published in a newspaper published in said county of Norfolk, but not in said Medway.

"5. I rule as a matter of law that the publication of said notice in a newspaper published in said county of Norfolk was a good and sufficient publication thereof."

The judge found for the defendant, and at the plaintiff's request reported the case to the Appellate Division, the report containing, among other facts, those that are stated in the opinion. The report also stated that the judge had denied a motion of the plaintiff for a new trial, and concluded as follows: "I hereby report the court's order denying the plaintiff's motion for a new trial to the Appellate Division for its determination, if I have the power to make such report."

In the Appellate Division the plaintiff moved that there might be incorporated into the report the plaintiff's request in writing for rulings, which he alleged had been presented to the trial judge in due season. The motion was denied.

The Appellate Division made an order denying the motion to amend the report and ordering that the report be dismissed. The plaintiff appealed.

R. L. c. 187, § 14, is as follows: "The mortgagee or a person

who has his estate in the land mortgaged or a person authorized by the power of sale may, upon a breach of the condition and without action brought, do all the acts authorized or required by the power; but no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice thereof has been published once in each of three successive weeks, the first publication to be not less than twenty-one days before the day of sale, in a newspaper, if any, published in the city or town in which the land lies; otherwise, in a newspaper published in such county."

St. 1912, c. 360, § 1, is as follows: "Whenever notice, advertisement or publication in connection with the foreclosure of mortgages or sales of real estate for non-payment of taxes or under execution is required by law, or otherwise, to be made or published in a newspaper printed or published in a town, city or county within the Commonwealth, such notice, advertisement or publication shall be sufficient for all purposes if made in a newspaper printed or published, or which shall by its title page purport to be printed or published, in such town, city or county, and which shall have a circulation therein."

Rule 37 of the Municipal Court of the City of Boston is as follows:

"Requests for rulings in the trial of causes shall be in writing and presented to the court before the closing arguments unless special leave is given to present further requests later.

"A request for a report to the Appellate Division shall contain a clear and concise statement of the ruling upon which a re-hearing is requested, sufficiently full and accurate for identification."

N. Barnett, for the plaintiff.

J. E. Crowley, for the defendant.

BRALEY, J. The report recites that the defendant introduced "evidence tending to show that the plaintiff was in default of payment upon principal and interest on the second mortgage, and interest upon the first mortgage," and the trial judge so found. The plaintiff's contention is that these findings are unwarranted. But, all the evidence not being reported, we are unable to say as matter of law that the findings should be set aside. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89. *Cohen* v. *Longarini*, 207 Mass. 556. *Savage* v. *Collins*, 211 Mass. 472.

It is also urged that the foreclosure is invalid because no legal notice was published. The language of the power of sale does not appear. The mortgaged premises were situated in the town of Medway in Norfolk County, and the judge has found that notice of the sale was duly published in the Dedham Transcript, a newspaper printed at Dedham, the county seat. If it be assumed in favor of the plaintiff, on whom the burden rests to show he has been prejudiced, that the power called for publication in some newspaper published in the town where the land lay, the finding is, that the West Medway Gazette is published at Milford in the county of Worcester, and the ruling that the publication in the Transcript was sufficient, is in accordance with R. L. c. 187, § 14, and St. 1912, c. 360. *Rose* v. *Fall River Five Cents Savings Bank*, 165 Mass. 273.

Nor does any error of law appear in the denial by the Appellate Division of the plaintiff's motion to have the report of the trial judge so amended as to incorporate certain requests for rulings alleged to have been seasonably proffered and saved. It was for that court to determine whether the plaintiff had complied with its thirty-seventh rule, that "Requests for rulings in the trial of causes shall be in writing and presented to the court before the closing arguments unless special leave is given to present further requests later."

The plaintiff's motion for a new trial was addressed to the discretion of the trial judge, even if by his second report he gave the plaintiff an opportunity to review his action before the appellate tribunal, which dismissed both reports.

The plaintiff having failed to show error the entry must be

Order dismissing reports affirmed.

GEORGE G. BARKER, assignee, *vs.* UNITED STATES FIDELITY AND GUARANTY COMPANY.

Plymouth. October 16, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Evidence, Opinion: experts, Of foreign law. *Practice, Civil*, Counsel as witness, Auditor's report, Exceptions. *Bond*, Execution. *Partnership. Conflict of Laws.*

In an action against the surety on an alleged bond of indemnity, just before the close of the evidence the defendant raised the point that the bond was not executed properly. It was signed "H Brothers and B, By A M B, one of the firm." The attesting clause recited that "said principals have hereunto set their hands and seals," but no seal was affixed to the signature described above. After the evidence had been closed, the presiding judge at the request of the plaintiff reopened the case and allowed the plaintiff to introduce testimony that the contract guaranteed and the bond of indemnity were delivered in the State of New York, and the plaintiff contended that the execution of the bond was valid and binding on the surety under the laws of New York. The plaintiff's counsel offered as an expert witness as to the law of New York his associate counsel, who knew the law of New York only by investigation and study, never having practised in that State, calling the attention of the judge to the New York decisions on which the proposed witness based his opinion. Subject to the defendant's exception, the judge allowed the witness to testify as an expert. *Held*, with some hesitation, that, although the judge well might have declined to accept the witness as an expert, yet under the circumstances of the trial it could not be said that the determination by the judge of the preliminary question of the qualification of the expert was clearly wrong and that therefore it must stand.

In the case above described it also was *held* that, the testimony of the expert as to the law of New York having been admitted, it was not necessary to consider whether the evidence in the case would warrant a finding that the signature in the firm name by one of the partners was ratified by his copartner and was binding under the law of this Commonwealth, the bond having been delivered in the city of New York where the persons concerned carried on business, so that it was to be assumed that the liability of the surety was to be determined by the law of New York.

In the same case it was *held* that an issue in regard to the cause of the decay of the timbers and planking of a chartered tugboat properly was left to the jury with careful instructions upon conflicting evidence.

In the same case the evidence consisted of an auditor's report and of oral testimony, and the defendant excepted to the refusal of the presiding judge to make certain rulings which dealt only with the evidence contained in the auditor's report. *Held*, that these exceptions must be overruled because the judge was not obliged to select for special comment the part of the evidence which was contained in the auditor's report.

CONTRACT against the surety on two alleged bonds of indemnity, as described in the opinion. Writ dated September 15, 1910.

In the Superior Court the case was referred to an auditor, who filed a report in which he found that the defendant owed the plaintiff the sum of $7,522.47 with interest from the date of the writ. Later the case was tried before *Dana*, J. The plaintiff put in evidence the auditor's report and the oral testimony of various witnesses, all of whom, except the experts, had testified before the auditor. The defendant also introduced evidence. After the close of the evidence there was a reopening of the case and further testimony was introduced by the plaintiff as explained in the opinion. The essential facts shown by the evidence are stated in the opinion. At the final close of the evidence the defendant asked the judge to make the following rulings, as well as others that were given by the judge as instructions to the jury:

"1. Upon all the evidence the plaintiff cannot recover.

"2. Upon all the evidence a verdict should be directed for the defendant.

"3. The signature and execution of the instruments in suit cannot be held sufficient to entitle the plaintiff to a finding and verdict.

"4. The signature of the principals in the manner 'By Anson M. Bangs, one of the firm' does not bind the defendant and make it liable in this action.

"5. The failure of the principals to sign and seal the instruments in suit defeats the right of the plaintiff to recover in this action.

"6. The instruments in suit will not support this action because they are unsealed by the principals.

"7. The instruments in suit will not support this action because they are not signed by both principals.

"8. The instruments in suit will not support this action because they are not signed by James Hughes.

"9. The instruments in suit will not support this action because they are not signed by Anson M. Bangs.

"10. If Hughes Brothers and Bangs used the boat only for the purpose and employed it in the tending of dredges and towing scows between New York Harbor and Sandy Hook, or adjacent places, the plaintiff cannot recover."

"12. There is no evidence in the case which can enable the jury

to determine the limit or extent of the injury to the Anna W. for which the defendant can be held liable."

"14. There is no evidence in the case from which it can be determined what was the wear and tear of the Anna W. or to what extent her wear and tear and resulting depreciation would result from her proper use, her constantly increasing age and lack of any safeguards against decay when she was built."

"16. The holding of a dredge on the range cannot furnish a basis of liability in this action.

"17. The holding of a dredge on the range was one of the uses which was contemplated by the charter of the Anna W."

"19. If the jury is unable to determine from the evidence what if any amount was spent for repairs caused by ordinary wear and tear and what for unreasonable wear and tear and what to make the boat 'practically as good as new,' there cannot be a verdict for the plaintiff."

"21. The findings and report of the auditor are speculative and conjectural and should be disregarded by the jury so far as they seek to state the extent of the damage caused by improper acts of Hughes Brothers and Bangs and the amount awarded therefor.

"22. The jury cannot award damages for injury to the Anna W. because there is no definite and certain testimony upon which to ascertain the figures and cost.

"23. The jury cannot award damages for loss of rent of the Anna W. due to her alleged improper use, because there is no definite and certain testimony upon which to ascertain the length of time required to perform the necessary repairs caused by the injuries resulting from any misuse for which Hughes Brothers and Bangs were responsible.

"24. The claim that was assigned to the plaintiff by the National Dredging Company did not include the items for damages caused by the alleged misuse of the Anna W. by Hughes Brothers and Bangs, but was limited to the claim as it had then been made on the defendant. It was neither in contemplation of the assignor nor the assignee. It cannot now be made a part of the claim upon which this suit was brought.

"25. If the jury find that the Anna W. was not in a leaking condition when she was put in Woodall's Dock in January, 1906,

there can be no recovery for damages alleged to be due to misuse by Hughes Brothers and Bangs.

"26. The extension of time given to Hughes Brothers and Bangs when the note of the Federal Contracting Company was taken operated to discharge this defendant from further liability on these bonds.

"27. Even though the taking of the note enured to the benefit of this defendant and a part of it was paid at its maturity and the balance was paid at the maturity of the second note given to renew a portion of its amount, this defendant was discharged by the extension of time given to Hughes Brothers and Bangs.

"28. The facts stated in the report of the auditor upon which his conclusions are based are the same facts which are contained in the testimony offered to the jury and are not sufficient in law to support the conclusions reached by the auditor and to justify a finding for the plaintiff.

"29. If the jury find the facts to be the same as stated by the auditor in his report, then upon all the evidence there should be a verdict for the defendant.

"30. If upon all the evidence in the case the jury find the facts to be what the auditor has stated in his report, the verdict must be for the defendant.

"31. The evidence, facts and findings reported by the auditor in his report do not justify his general finding and conclusion and the general finding and conclusion was not warranted or justified as a matter of law and is erroneous as a matter of law apparent upon the face of his report; therefore, while the jury are to regard his report as *prima facie* evidence of the facts and findings therein stated, the jury are instructed as a matter of law that the evidence, facts and findings reported by the auditor do not warrant or justify the general finding or conclusion to which the auditor has come.

"32. The general finding and conclusion of the auditor, based upon the evidence, facts and findings reported by him, was not warranted or justified as a matter of law and is erroneous as a matter of law upon the face of his report and therefore, while the jury are to regard the report as *prima facie* evidence of the facts and subordinate findings therein stated in connection with other evidence in the case, the jury are instructed that as a matter of

law the evidence, facts and findings reported by the auditor do not warrant or justify the general finding or conclusion to which the auditor has come."

"34. The owner under the charter had a right to select officers for the Anna W. Its failure to do so must be considered as affecting and modifying the liability of the defendant. It was not only a right; it was a duty owed to the surety. (Limited to last sentence.)

"35. Upon all the evidence in the case and taking into consideration that the Anna W. was a tugboat, there is no evidence that when she was turned over to the National Dredging Company on January 15, 1906, that she had been used except as a tugboat is ordinarily used and was contemplated by the charter and that the damages stated in the survey were the result of accidents due to the ordinary use of such boats in similar service."

"38. Upon the questions of rent, interest, transfer of boats to the New Jersey company, arbitration, extension of time and the claims made by the plaintiff stated in paragraph fourteen of the auditor's report, there has been no evidence at the trial to the jury in addition to the auditor's report, and upon all the evidence the verdict upon these portions of the plaintiff's claim should be for the defendant.

"39. The position of this defendant is presumed by law to have been prejudiced by the taking of the notes of the Federal Contracting Company and the extension of time given to Hughes Brothers and Bangs.

"40. There is no evidence in the case to show the extent of damage caused by the alleged misuse of the Anna W. outside the survey, and until the auditor's report is overcome by other evidence it must stand and control."

The judge refused to make any of the rulings quoted above except so far as they were covered by his charge and except the last sentence of the ruling numbered thirty-four, to which he limited that ruling. He submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $26,675, of which the plaintiff, in accordance with an order made by the judge upon a motion of the defendant for a new trial, remitted $4,175, leaving the verdict to stand in the sum of $22,500. The defendant alleged exceptions, which are explained in the opinion.

H. V. Cunningham, for the defendant.

S. L. Whipple, (*J. M. Hoy* with him,) for the plaintiff.

De Courcy, J. In 1904, James Hughes and Anson M. Bangs, doing business in New York City under the firm name of Hughes Brothers and Bangs, were engaged in excavating a channel in New York harbor. They entered into two separate charter parties with the owner, the National Dredging Company (the assignor of the plaintiff), for the tugboats known as the Anna W. and the Gerry; and gave a separate bond, with the defendant as surety, to secure the faithful performance of the obligations of each charter party. The tugboats were delivered to the charterers on September 10, 1904, and thereafter remained in their possession, the Gerry until September 9, 1905, and the Anna W. until January 15, 1906.

This action is brought against the surety to recover for the alleged breach of each bond. The count on the bond given in connection with the Gerry is for a small balance of rent. The count on the bond given in connection with the Anna W. is to recover a balance of rent and also damages for injury to that tugboat beyond the ordinary wear and tear justified under the terms of the charter party. There was a verdict for the plaintiff, and the case is here on the defendant's exceptions to the admission of testimony and to the refusal of the presiding judge to give certain rulings requested.

1. The bonds were signed, "Hughes Brothers and Bangs, By Anson M. Bangs, one of the firm." The attesting clause recited "said principals have hereunto set their hands and seals," but no seal was affixed. After the close of the evidence the judge reopened the case, and permitted the plaintiff to introduce testimony that the charter parties and the bonds were delivered in the city of New York. The plaintiff contended that the execution of the bond was valid and binding on the surety under the laws of New York; and called one of his own counsel as an expert, who testified that in his opinion these bonds were binding upon the surety under the New York law. The defendant's exception is to the qualification of the witness as an expert. It was for the presiding judge to determine this preliminary question, and his decision must stand unless it was clearly wrong. *Greene* v. *Corey*, 210 Mass. 536. In view of the limited experience of the witness

as to the law of a State where he had never practised, and his partisan interest as associate counsel, we think the judge well might have declined to accept him as an expert witness. On the other hand, the defendant reserved until the close of the testimony the point which made this evidence material, and the New York decisions on which the witness based his opinion were called to the attention of the judge. With some hesitation we overrule this exception.

2. Requests numbered one to nine inclusive raise the question of the validity of the bonds and the liability of the surety thereon in view of the signature of the firm name by one partner, and the absence of a seal. It is not necessary to consider whether the evidence would warrant a finding that the signature in the firm name by Anson M. Bangs was authorized or ratified by his co-partner, James Hughes, and binding under our law. See *Russell* v. *Annable*, 109 Mass. 72; *Golding* v. *Brennan*, 183 Mass. 286. The bonds were executed and delivered in New York city, where the contractors carried on business; and presumably the liability of the surety thereon must be determined by New York law. In view of the testimony of the expert witness as to the validity and effect of the bonds under that law these rulings could not be given.

3. Requests numbered twelve, fourteen, nineteen, twenty-two and forty were refused rightly. Without reciting the conflicting evidence in detail, it warranted the jury in finding that the decayed condition of the timbers and planking of the Anna W. found after her return by the charterers, was not wholly due to the absence of salt pockets, lack of ventilation and the use of fernaline as a wood preservative, as the defendant contended. There was also evidence for the jury, the weight of which was for them to determine, that the decay was ordinary wet rot, as distinguished from dry rot; and that it was caused by the seeping of water, — when the boat was between the load water line and the light water line, where the planking was strained and the boat leaky, — wetting the inside, and then drying when the boat was not deep in the water. There was also evidence that the leaks at the water line, and the consequent rotten condition of the timbers, were due to improper usage to which the Anna W. was subjected by the charterer, such as the collisions, the absence of proper fenders while towing heavy scows alongside, and

the use of the tugboat head on to the dredge, for the purpose of holding the dredge in position "when the wind blew so hard that they couldn't hold her with cables." The judge rightly submitted to the jury these issues, with the conflicting evidence, and carefully instructed them to confine the plaintiff's damages to the decayed condition of the boat shown to have been caused by misuse on the part of the charterers.

4. Requests twenty-one, twenty-eight, twenty-nine, thirty, thirty-one and thirty-two deal with the auditor's report. This was only a part of the evidence, and the uncertainties complained of in that report were largely remedied by the additional testimony submitted to the jury. The judge was not obliged to select this part of the evidence for special comment, and no exception was taken to the way he dealt with it in the charge.

5. Requests twenty-six, twenty-seven and thirty-nine could not be given. On the findings of the auditor the notes taken by the owners when the charterers were behind in their payments, were taken as collateral security and not in payment. So far as any alleged extension of time was involved, the auditor further found that the notes were asked for in consequence of the suggestion of the defendant's representative, made when he was notified of the arrears; and that the defendant suffered no actual harm by the transaction. See *People* v. *Traes*, 188 Mich. 345; *Guaranty Co.* v. *Pressed Brick Co.* 191 U. S. 416; *Olmstead* v. *Latimer*, 158 N. Y. 313.

6. The remaining requests may be disposed of briefly. Those numbered ten, sixteen and seventeen could not be given in view of the evidence, especially that showing that the charterers used the tugboat in an improper and careless manner. And see *Barber Asphalt Paving Co.* v. *Mullen*, 220 Mass. 308. For a like reason twenty-three and thirty-five were rightly refused. As twenty-four, twenty-five, thirty-four and thirty-eight have not been argued, it is enough to say that we discover no error in the refusal to give them.

Exceptions overruled.

EDWARD C. WHITING *vs.* EDWARD R. HOUGHTON, executor.

Middlesex. October 16, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Trustee Process, Costs of trustee. *Practice, Civil*, Costs.

The provision of St. 1852, c. 312, § 9, that "If no declaration shall have been inserted in the writ, or filed pursuant to the eighth section, it shall be a discontinuance of the action. And the defendant or trustee may have judgment for costs," which was re-enacted in substance in Gen. Sts. c. 129, § 9, and in Pub. Sts. c. 167, § 9, was omitted from R. L. c. 173, § 11, and it here was *held* that such omission was intentional, and that where a writ served by trustee process seasonably was returned to court but the plaintiff neglected to enter it and the trustee did not appear, such trustee cannot maintain a complaint for costs against the plaintiff who sued out the writ.

COMPLAINT FOR COSTS, filed in the Superior Court on January 27, 1917, by a person summoned as trustee of Lillian A. Daly by Edward R. Houghton, executor, who sued out a writ dated November 29, 1916, which he wholly neglected to enter.

The case was heard by *Wait*, J., who found that the averments contained in the complaint were true, but ordered that the complaint be dismissed on the ground that the court as matter of law had no power to award costs to one named as trustee in a writ not entered. The complainant alleged exceptions.

The case was submitted on the complainant's brief.

H. S. Davis & R. W. Baker, for the complainant.

No counsel appeared for the executor.

PIERCE, J. This is a complaint for costs by Edward C. Whiting duly summoned as trustee of Lillian A. Daly, named as defendant in a writ sued out by Edward R. Houghton and returnable on the first Monday of January, 1917. The writ was duly returned to court but the plaintiff neglected to enter it. The trustee did not appear and answer. The present complaint was filed before the next return day, and, after hearing, was dismissed by a judge of the Superior Court.

It is settled by *Duffee* v. *Call*, 123 Mass. 318, and *Dudley* v. *Keith*, 153 Mass. 104, that a person duly summoned as trustee

of the principal defendant in a writ purchased and served between the enactment of St. 1852, c. 312, § 9, and R. L. c. 173, § 11, was by the law then in force entitled to his costs if the writ was not entered at the return day, upon appearing pursuant to the summons served upon him and filing a complaint before the next succeeding return day.

Before St. 1851, c. 233, § 7, and St. 1852, c. 312, § 7, which provided that "In actions of contract and actions of tort, the writ need not contain any declaration, nor any description of the cause of action other than the name of the form of action in which it is intended to declare," the declaration was a part and a necessary part of the writ; and a plea in abatement might conclude "with a prayer of judgment of the writ, although the fault is not in that part which is given in the statute, but in the declaration. *Ilsley* v. *Stubbs*, 5 Mass. 280."

In *Brigham* v. *Este*, 2 Pick. 420, which ordered to abate a writ which contained no count or declaration, Parker, C. J., said: "The writ, when served, must be returned into the court by the officer who makes the service. . . . If a writ containing no count, nor any cause of action, should be so returned, and the defendant should not appear, no judgment can be rendered; for the court in such case are to take the declaration for true, and render judgment according to it; but in such case they have nothing to proceed upon, and the writ must therefore be a nullity."

In *Gilbreth* v. *Brown*, 15 Mass. 178, a writ was served, the action was duly entered, and stood continued for several terms, when the plaintiff discovering that he could not proceed in his action by reason of the sheriff's neglect in not making return of the writ, moved to withdraw the action from the docket, which was allowed. Wilde, J., in delivering the opinion of the court, said that this act of the plaintiff was a discontinuance of the suit according to the intendment of St. 1784, c. 28, § 9, which reads "when any plaintiff shall in any stage of his action become nonsuit, or discontinue his suit, the defendant shall recover his cost against him, and that in all actions as well those of *qui tam* as others, the party prevailing shall be entitled to his legal costs against the other;" and also said, in illustration, "If the plaintiff had failed to enter his action, the defendant, on complaint, would have been entitled to costs."

As regards the right of a trustee in trustee process, before the statute of 1852, *supra*, to a judgment for costs when the creditor shall become nonsuit or discontinue his action, "The court observed" in *Cleveland* v. *Clap*, 5 Mass. 201, 207, "that the costs to be taxed for or against trustees must depend on the construction of the statute of 1794, c. 65, commonly called the trustee act." The part of that statute applicable to the subject matter of discussion is § 4, which reads: ". . . where the Plaintiff doth not support his action against the principal, and judgment shall be rendered that he take nothing by his writ, the Court shall award costs against him, as well in favor of the principal as in favor of such of the persons summoned as trustees severally, who have personally appeared in Court and submitted themselves to an examination upon oath." It appears plainly therefore that to entitle a trustee to judgment for costs the creditor must have failed in his action against the debtor or discontinued his suit against the trustee who has submitted to an examination at the first term. *Cleveland* v. *Clap*, *supra*. *Wilcox* v. *Mills*, 4 Mass. 217. *Brown* v. *Seymour*, 1 Pick. 32. *Wilmarth* v. *Richmond*, 11 Cush. 463.

The statute of 1794, *supra*, has not been materially changed since its enactment. Rev. Sts. c. 109, § 51. Gen. Sts. c. 142, § 62. Pub. Sts. c. 183, § 75. R. L. c. 189, § 69.

The decision of *Brown* v. *Seymour*, rests upon the statute of 1784 as applied to non-entries of writs and to writs served without count or declaration, and upon the statute of 1794, *supra*, and is not authority for the position that costs were adjudged to the trustee as a common law right.

In this state of the law defining and limiting the right of a trustee to a judgment for costs against a plaintiff who has failed in his action against the defendant, St. 1852, c. 312, § 9, was passed. That statute reads as follows: "If no declaration shall have been inserted in the writ, or filed pursuant to the eighth section, it shall be a discontinuance of the action. And the defendant or trustee may have judgment for costs." The same language appears in Gen. Sts. c. 129, § 9, and in Pub. Sts. c. 167, § 9. In the R. L. c. 173, § 11, the provision first appearing in the St. of 1852 and re-enacted in the Gen. Sts. *supra* and in Pub. Sts. *supra*, that "If no declaration shall have been inserted in the writ, . . . it shall be a discontinuance of the action. And

the . . . trustee may have judgment for costs," was omitted. It is the contention that the effect of the statute remains the same; that it is an instance of abbreviation and condensation, and is not intended as a change. We cannot agree, and are of opinion that the omission was intended.

It follows that the exception must be overruled.

So ordered.

MAY MARAN *vs.* FRANCIS PEABODY, JR., & another, trustees.

Suffolk. October 17, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Negligence, Of one controlling real estate. *Landlord and Tenant. Covenant.*

Where a salesgirl, whose employer occupies a part of the first and second floors of a city building, has occasion in the course of her duty to go from the second to the first floor and is forbidden to use the elevator, if she attempts to descend a marble staircase with which she is familiar and on which she knows that the electric lamps are not lighted, this staircase being the only way open to her of getting to the floor below, and holding by the hand rail falls at the first turn by reason of the insufficient lighting of the stairway, in an action by her against the owner of the building for her injuries thus sustained, there is evidence of her due care to be submitted to the jury.

In the action above described it appeared that the defendant, who as the owner of the building had retained control of the elevator and the common stairways, had provided the means and had assumed the duty of lighting the halls and common stairways, that the staircase on which the plaintiff fell wound round the elevator, that the only natural light that reached any part of the stairs came through certain glass doors and through certain crinkled-glass partitions on a hallway on the second floor which was "dark and gloomy" and that, although there was an electric lamp in front of the elevator and another one close to the stairs, neither of them was lighted, that the weather was cloudy and that the elevator when going up and down cast lights and shadows on the stairs. *Held*, that a finding was warranted that, in order to render this stairway reasonably safe for the plaintiff's use at the time of the accident, the defendant should have provided artificial light and that he failed to perform that duty.

In the same case it appeared that the plaintiff's employer had covenanted in his lease that the lessor should not "be liable to the lessee, or to any other person for any injury, loss or damage to any person or property on the premises, or in the" building. The stairway on which the accident happened was not leased to the plaintiff's employer. *Held*, that, whatever might be the respective rights of the landlord and the tenant under this covenant, it did not deprive the plaintiff of her remedy against the owner of the building, whose negligence caused her injury.

TORT against the trustees of the Standish Building Trust, so called, as the owners of a building numbered 367 on Boylston Street in Boston, for personal injuries sustained by the plaintiff, who was a salesgirl in the employ of a tenant occupying portions of the first and second floors of the building, on the morning of June 14, 1915, by reason of the plaintiff falling when, having been excluded from the use of the elevator, she was descending from the second to the first floor on a marble staircase that wound round the elevator and was lighted insufficiently. Writ dated December 16, 1915.

In the Superior Court the case was tried before *O'Connell*, J. The evidence is described in the opinion. At the close of the evidence the defendants asked the judge to order a verdict for them. This the judge refused to do. The defendants then asked the judge to make the following rulings:

"If the plaintiff for a period of five or six years had used the stairway on which she fell on an average of twelve times a day, and if on going up the stairway just before her accident she observed that the electric lights were not lighted, and if before starting to descend the stairway she also noticed that the electric lights in the hallway were not lighted, and under those circumstances continued to go down the stairs and fell because of any darkness, then she was not in the exercise of due care and cannot recover.

"The right of the plaintiff's employer to recover against the defendants under similar circumstances would be determined by the terms of the written lease which he took from the defendants, and if the said lease provides that the defendants shall not be liable to the lessee or to any other person for any injury, loss or damage to any person or property on the premises or in the said Standish Building, this provision would preclude the plaintiff's employer from recovering in an action against the defendants for any damage to his person or property, and the plaintiff's rights being the same and only the same as those of her employer, she cannot recover in this action."

It appeared in evidence that the lease from the defendants to the plaintiff's employer contained a covenant of the lessee "that in no case whatsoever shall the lessors be liable to the lessee, or to any other person for any injury, loss or damage to any person or property on the premises, or in the Standish Building. . . ."

The judge refused to make either of these rulings and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $2,500, of which the plaintiff remitted the sum of $1,000. The defendants alleged exceptions.

E. H. Hewitt, for the defendants.

W. J. Barry, for the plaintiff.

De Courcy, J. The defendants, the owners of a building on Boylston Street, in Boston, had leased portions of the first and second floors to one Rosenbaum. The elevator, halls and common stairways remained in their control, and they had provided the means and assumed the duty of lighting them. The plaintiff, an employee of Rosenbaum, after leaving her employer's shop on the second floor was descending the flight of marble steps to the first floor when she fell and was injured.

The plaintiff was familiar with the place, and was aware that the electric lamps were not then lighted; but it was necessary for her to use this stairway at the time because, on the evidence, she had been forbidden to use the elevator by the defendants' employee who operated it. And she testified that she had hold of the hand-rail until she fell at the first turn, where the treads were wider at the left than at the right. The issue of her due care was submitted to the jury rightly. *Marston* v. *Reynolds*, 211 Mass. 590.

The only alleged negligence of the defendants that went to the jury was their failure to properly light the stairway. The plaintiff was using it by their implied invitation, and they owed her the duty of maintaining it in a reasonably safe condition. The elevator shaft was enclosed by iron grill work, and round this wound the marble staircase. The evidence tended to show that the only natural light reaching any part of the stairs came through the glass doors on Boylston Street, and through the doors and crinkled-glass partitions between Rosenbaum's office on the second floor and the hallway; that when the plaintiff came from the office she found this hallway dark, and the stairway "dark and gloomy;" that although there was an electric lamp in front of the elevator, and one close to the stairs, neither was lighted; that the weather was cloudy that morning, and that the elevator when going up or down cast lights and shadows on the steps. On all the evidence we think the jury were warranted in finding that in order to render this stairway reasonably safe for the plaintiff's use at the time of

the accident, the defendants should have provided artificial light in pursuance of the obligation they had assumed, and that they failed to perform that duty. *Marwedel* v. *Cook*, 154 Mass. 235. *Gallagher* v. *Murphy*, 221 Mass. 363.

The presiding judge rightly refused to give the requested ruling which was based upon a clause in the lease of the plaintiff's employer. The accident did not happen on the premises demised to Rosenbaum. "Whatever may be the respective rights of the landlord and tenant under such a covenant, it does not prevent a person injured from resorting to the liability of the one whose tort has harmed him." *Follins* v. *Dill*, 221 Mass. 93, 98.

Exceptions overruled.

MICHAEL J. MURRAY, administrator with the will annexed, *vs.* MICHAEL CANGIANO.

Middlesex. October 17, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & CARROLL, JJ.

Probate Court, Appeal.

On an appeal from a decree of the Probate Court the appellant is confined to his objections to the decree appealed from which he has stated under the requirement of R. L. c. 162, § 10.

APPEAL of Michael Cangiano from a decree of the Probate Court of the county of Middlesex granting a petition of the administrator with the will annexed of the estate of Lucido Capozzoli, late of Medford, for leave to sell two certain parcels of real estate.

The objections to the decree filed by the appellant were as follows:

"1. That the report of the commissioners in insolvency was pending in the Superior Court for the County of Middlesex, upon appeal, and the amount of the debts of the estate had not been determined.

"2. The petition was to sell two parcels of real estate situated in different counties and the decree was to sell the whole and the sale of the property as a whole would not be advantageous to the estate.

"3. That the sale of all of the real estate of the deceased was not necessary to pay the debts of the deceased; that the proceeds of the sale of a portion of the real estate were sufficient, in addition to the personal property, to pay the debts of the estate.

"4. That the administrator with the will annexed was the holder by assignment of a mortgage upon one of the parcels of real estate, and until the value of such mortgage was ascertained it did not appear that there was not sufficient personal estate to pay the debts of the deceased."

The case was heard by *Pierce*, J., who made the following final decree: "This cause came on to be heard at this sitting, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the decree of the Probate Court, dated December 13, 1916, upon the petition of Michael J. Murray, administrator with the will annexed of the estate of Lucido Capozzoli, late of Medford, for leave to sell real estate, be, and the same is hereby, affirmed and the case remanded to the Probate Court for further proceedings."

The respondent Michael Cangiano appealed. At the request of the respondent the single justice found and reported that the following were the material facts in the case: "That the sale of either of the parcels described in the petition might have been made separately without injury to the value of the other parcel; that the copy of the citation introduced by the respondent is a true copy of the citation issued by the Probate Court upon the petition and was the citation served in the case."

J. E. Crowley, for the respondent.

F. M. Carroll, for the petitioner.

CARROLL, J. The decree of the Probate Court licensed the petitioner, who was the administrator with the will annexed of the estate of the deceased, to sell at public auction the whole of the real estate of the testator. From this decree an appeal was taken to the Supreme Judicial Court. The single justice affirmed the decree of the Probate Court and found that a sale of either of the parcels described in the petition might have been made separately without injury to the value of the other parcel, and that the copy of the citation in evidence was a true copy of the citation issued and served in the case. No other facts were found and no evidence is reported. The case is before us on the

respondent's appeal from the final decree made by the single justice.

The appellant in his statement of objections to the decree of the Probate Court alleges, first, that the report of the commissioners in insolvency was pending in the Superior Court for the county of Middlesex, upon appeal, and the amount of the debts of the estate had not been determined. Without intimating that the facts stated in the first objection, even if true, would invalidate the decree of the Probate Court, it is enough to say that the record discloses nothing to support the appellant's contention. There are no facts found, nor is there any evidence to show that the commissioners' report was pending in the Superior Court on appeal, or that the debts of the estate had not been determined when the decree of the Probate Court was entered. See *Tenney* v. *Poor*, 14 Gray, 500. No part of the evidence before the single justice is reported; and unless he was without jurisdiction to order the entry of the decree appealed from, it must be affirmed. *Mason* v. *Lewis*, 115 Mass. 334. *Codwise* v. *Livermore*, 194 Mass. 445.

What we have said applies to the other objections. No fact appears showing that the judge of the Probate Court erred in decreeing that a sale of a part of the premises would be injurious to the residue although a sale of one parcel might be made separately without injury to the value of the other parcel, as found by the single justice, nor is there any evidence to show that it was unnecessary to sell the whole of the real estate to pay the debts of the deceased or that the petitioner was "the holder by assignment of a mortgage upon one of the parcels of real estate."

The petition for leave to sell, after describing two parcels of land and stating that by a partial sale thereof the residue would be greatly injured, asks that the petitioner may be licensed to sell the whole of said "parcel." On this petition a citation issued which alleged that the petitioner had presented his petition for license to sell "the whole of a parcel of the real estate" of the deceased. The decree licensed the petitioner to sell "the whole of said parcels of real estate." The appellant now contends that, inasmuch as the petition described two parcels of land and asks to sell the whole of said parcel, while the citation gave notice of a hearing to sell "the whole of a parcel," the notice not agreeing with the petition

and the license not agreeing with the notice, the decree of the Probate Court is wrong.

In a probate appeal the objections filed under R. L. c. 162, § 10, present the issue to be tried. They describe the reasons for appealing and set forth the appellant's case. He is confined to the reasons stated in his statement of objections. *Bartlett* v. *Slater*, 183 Mass. 152. *Phillips* v. *Chase*, 203 Mass. 556, 568. Even if the variation in the notice from the petition and license were material (see in this connection *Brigham* v. *Boston & Albany Railroad*, 102 Mass. 14, 18), no such question was raised by the appellant's objections; it is not before us.

The appellant also argues that the decree should be reversed because the petitioner did not set out the legacies given in the will of the deceased. This point was not presented in his reasons for appeal or in the statement of objections to the decree. It may be added, however, that there is no evidence in the record before us to show that the deceased gave any legacies.

Decree affirmed.

GEORGE W. ABELE, trustee, *vs.* BEACON TRUST COMPANY.

Suffolk. October 17, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Bankruptcy, Unlawful preference. *Equity Pleading and Practice*, Appeal, Findings of judge.

In a suit in equity by a trustee in bankruptcy of a business corporation against a trust company to set aside as an unlawful preference an assignment by the bankrupt one month before it was adjudged a bankrupt of certain accounts to the defendant as additional security for the payment of a demand promissory note of the bankrupt payable to the defendant, findings by a judge of the Superior Court that at the time of the assignment the debtor was insolvent and that the effect of the assignment was to give the defendant a preference under the bankruptcy act as of the date of the filing of the petition in bankruptcy, cannot be reviewed in the absence of a report of the evidence on which the findings were based.

In the same case it was assumed, for the purposes of decision, that a finding of the judge, that "the trust company had reasonable cause to believe that a preference was being effected," was an inference drawn by the judge from other facts found by him and set forth in the record. By the record it appeared that, at the time

of the assignment to the defendant, the defendant's vice president, to whom the assignment was delivered, had been informed of the following facts: Of the inability of the debtor to pay a claim of $2,395.08 for which it was being sued by a creditor, of statements of the debtor's treasurer that his company was not able to pay its debts, of an offer made by the debtor to give time notes in payment of its debt to the suing creditor and to secure such notes by an assignment of the very accounts afterwards assigned to the defendant, of the fact that the debtor was in default on its oral agreement to pay $200 a month on the demand note held by the defendant and was being pressed for payments. *Held*, that, from these and other facts reported in the record, the judge was warranted in finding that the defendant had knowledge or notice of facts sufficient to put a reasonably cautious and prudent person upon inquiry as to the debtor's solvency and the probable effect of the assignment as a preference, and that an investigation would have disclosed the facts that the debtor was insolvent and that the necessary effect of this assignment would be to prefer the defendant.

In the same case it was *held* that the findings stated above were sufficient to support a decree setting aside the assignment without the plaintiff showing that the bankrupt intended a preference or that the defendant believed that such a preference was intended.

BILL IN EQUITY, filed in the Superior Court on January 25, 1917, by the trustee in bankruptcy of the Mattapan Motor Car Company, a business corporation, to set aside as an unlawful preference an assignment of certain accounts by the bankrupt to the defendant, the Beacon Trust Company, as described in the opinion.

The case was heard by *Jenney*, J. He made a finding of facts, including the findings that are stated in the opinion, and ordered that a decree be entered setting aside the assignment to the Beacon Trust Company as a preference and ordering the defendant to pay the plaintiff's costs.

Later by order of the judge a final decree to this effect was entered, from which the defendant appealed.

W. J. Barry, for the defendant.

H. M. Chase, (*G. W. Abele* with him,) for the plaintiff.

DE COURCY, J. On December 11, 1914, the Mattapan Motor Car Company owed the defendant trust company $5,000 and interest on a demand note, which was secured by indorsements and by a mortgage covering the stock in trade and other personal property of the maker. On that date the Mattapan company delivered to the trust company, as additional collateral security for the above indebtedness, an assignment of certain accounts against the Atterbury Motor Car Company, amounting to approximately $1,504. On January 11, 1915, the Mattapan company was duly adjudged a bankrupt, and later the plaintiff was appointed its trustee in bank-

ruptcy. This suit was brought to set aside as a preference the assignment of the Atterbury company accounts. After a hearing the judge of the Superior Court filed a finding of facts, and ordered a decree in favor of the plaintiff.

Under the bankruptcy act of 1898 (U. S. St. 1898, c. 541, § 60 b. as amended by U. S. St. 1903, c. 487, § 13, and U. S. St. 1910, c. 412, § 11) the plaintiff was entitled to recover if he established (1) that the Mattapan company was insolvent at the time it assigned the Atterbury company accounts to the defendant; (2) that this transfer operated as a preference to the trust company, by securing to it a greater percentage of its pre-existing claim than other creditors of the same class, and (3) that the defendant, or its agent acting for it, then had reasonable cause to believe that it was getting a preference. *Putnam* v. *United States Trust Co.* 223 Mass. 199.

As to (1), the trial judge has found as a fact that the debtor was then in a bankrupt condition, within the statutory definition, and that finding cannot be reviewed in the absence of the evidence on which it was based. See *Batchelder* v. *Home National Bank*, 218 Mass. 420.

As to (2), there is a finding that "the effect of the assignment was to give the trust company a preference under the bankruptcy law as of the date of the filing of the petition in bankruptcy." The conclusiveness of such finding, where the evidence is not reported, apparently is not questioned by the defendant. See *Wilson* v. *Mitchell-Woodbury Co.* 214 Mass. 514.

The judge also found (3) that "the trust company had reasonable cause to believe that a preference was being effected." Plainly this finding of fact cannot be reviewed if it was based upon evidence which is not reported. Even if we assume that the finding is an inference from the other facts found by the judge and set forth in the record, we cannot say that it is wrong. When these accounts which the Mattapan company held against the Atterbury company were assigned to the defendant trust company, the vice-president of the trust company, to whom the assignment was delivered, had been informed of the following facts: the inability of the debtor to pay a claim of $2,395.08 for which it was being sued by one Sutherland; the statements of the debtor's treasurer that his company was not able to pay its debts; the offer made by the debtor

to give time notes in payment of the Sutherland debt and to secure them by an assignment of these very claims due from the Atterbury company; and the fact that the debtor was in default on its oral agreement to pay $200 per month on the demand note held by the trust company, and was being pressed for payments. From these and other facts reported in the record the judge would be warranted in finding that under the circumstances the trust company had knowledge or notice of facts sufficient to put a reasonably cautious and prudent person upon inquiry as to the debtor's solvency and the probable effect of the assignment as a preference; and that an investigation would have disclosed the facts that the debtor was insolvent and that the necessary effect of this assignment would be to prefer the trust company. It was not necessary for the plaintiff to go further and show that the bankrupt intended a preference or that the trust company believed that such preference was intended. *Rogers* v. *American Halibut Co.* 216 Mass. 227. *Jacobs* v. *Saperstein*, 225 Mass. 300.

What has been said disposes of the defendant's requests for rulings, and the entry must be

Decree affirmed with costs.

CHARLES H. FULLER *vs.* CLARENCE E. FULLER.

Norfolk. October 11, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Equity Pleading and Practice, Interlocutory decree, Master's report: exceptions to, motion to recommit. *Equity Jurisdiction*, To remove cloud from title. *Tax*, Sale for non-payment. *Deed*, Validity. *Fraud*, As against creditors.

In a suit in equity a master made a report in favor of the plaintiff, to which the defendant filed exceptions based on the refusal of the master to make certain findings of fact requested by him, and the trial judge made an interlocutory decree, which without referring to the exceptions ordered that the report of the master be confirmed. The defendant appealed from this decree. *Held* that, although the decree should have stated that the defendant's exceptions were overruled, this informality was not material because no exceptions to a master's refusal to make findings of fact can be sustained.

In the same case the defendant before the making of the interlocutory decree had filed a motion to recommit the report to the master for amendment. No formal

order was made upon the motion to recommit. *Held*, that no such order was required, as the motion to recommit necessarily was denied by the interlocutory decree confirming the master's report.

One who as a devisee is seised of real estate, of which he is in possession and control, can maintain a suit in equity to remove from his title a cloud created by an invalid tax sale and a deed given thereunder.

A conveyance of real estate can be avoided on the ground that it was made in fraud of creditors only by a creditor or by one who has the rights of a creditor.

Where a recital in a tax collector's deed, given in pursuance of a sale for non-payment of taxes, states that a demand was made on a certain former owner of the land for payment of the tax, and it is shown that at the time of such alleged demand the former owner was dead and was known to be dead by the person who procured the making of the tax sale, and where the tax collector had constructive notice of the death of the delinquent taxpayer by the probate records of the admission of his will to probate and of the appointment of an executrix, it is plain that "the name of the person on whom the demand for the tax was made" was not inserted in the deed as required by R. L. c. 13, § 43, and that the deed is absolutely void.

BILL IN EQUITY, filed in the Superior Court on July 2, 1915, by the owner of a parcel of land with the buildings thereon in the part of Quincy called West Quincy, to remove from the plaintiff's title a cloud created by a certain tax sale, alleged to be invalid, and by a deed given thereunder.

The case was referred to a master, who filed a report, in which he found the facts that are stated in the opinion. He found and ruled that the tax title under which the defendant claimed, and which was a cloud on the plaintiff's title, was invalid, and that the plaintiff was entitled to a decree relieving his title from the incumbrance. He also found that, if the court should determine that the tax deed was valid, the plaintiff was entitled to redeem the premises from it.

The defendant filed exceptions to the master's report and also filed a motion that the report be recommitted to the master for amendment.

The case was heard by *Raymond*, J., who made an interlocutory decree, which, without mentioning the exceptions, ordered that the report of the master be confirmed. The defendant appealed from this interlocutory decree.

Later the case was heard further by *Raymond*, J., upon the master's report and by order of the judge a final decree was entered in favor of the plaintiff. The defendant appealed from the final decree.

C. E. Fuller, defendant, *pro se*.

C. E. Haywood, for the plaintiff, was stopped by the court.

BRALEY, J. The interlocutory decree confirming the report should have recited that the exceptions to the report were overruled, but the omission is of no material consequence as exceptions do not lie to a master's refusal to make findings of fact as requested.

The report having been confirmed, the motion to recommit, although not appearing by the record to have been formally disposed of, was necessarily denied by the interlocutory decree, and the only question for decision is whether the final decree from which the defendant appealed is in accordance with the master's report and the pleadings.

The defendant claims title to the land described in the bill, under a sale for non-payment of taxes which the plaintiff alleges is invalid, and, the tax deed having been recorded, it is a cloud upon the plaintiff's title. The evidence is not reported, and the master's findings on all questions of fact are conclusive. It appears from the report that at the date of filing the bill the plaintiff was seised of the premises under a conveyance from his mother, who derived title under the will of her husband, duly admitted to probate, and it is found expressly that since June 21, 1913, he has been in possession and control of the property. It is plain without further discussion that he can maintain the suit for the purpose of clearing the title. The defendant contends that the plaintiff has been guilty of such unconscionable conduct as to deprive him of any standing in a court of equity. But it is unnecessary to recite the master's findings which show, not only the plaintiff's good faith, but such conduct of the defendant as to raise doubts whether he did not deliberately attempt to overreach his mother, brother and sisters in the settlement of the estate.

It further is found on ample facts that the defendant's next contention, that the plaintiff acquired title through fraud and undue influence practiced upon his mother, is without foundation, and, whether her deed to the plaintiff was in fraud of creditors, is a defence not open to the defendant, to whom neither she nor her husband is shown to have been indebted.

The validity of the collector's deed now becomes the decisive inquiry. The tax was assessed for the year 1907. The deed recites that on January 20, 1908, a summons was served on Frederick J.

Fuller, and on May 8, 1908, a demand was made on him for payment of the tax. But, as the testator died on November 13, 1907, these recitals are false, and his son the defendant, who is not shown to have been illiterate, and by whom as the master finds the tax sale was procured to be made, must be deemed to have known of their falsity. The collector also was charged with constructive notice of the probate records which show the delinquent taxpayer's death, the admission of his will to probate and the appointment of the executrix. *Conners* v. *Lowell*, 209 Mass. 111, 119. A demand upon the resident owner was necessary. R. L. c. 13, § 14, now St. 1909, c. 490, Part II. *Hunt* v. *Holston*, 185 Mass. 137. It was not made on the devisee or served on her "in the manner required by law for the service of subpoenas upon witnesses in civil cases." R. L. c. 13, §§ 13, 53. If the collector's statement that he demanded payment of the decedent need not be further characterized, it is certain that the course taken resulted in delivering a deed wherein "the name of the person on whom the demand for the tax was made" has never been inserted as required by R. L. c. 13, § 43. The failure of compliance by the collector with these precedent conditions renders the deed absolutely void. *Charland* v. *Home for Aged Women*, 204 Mass. 563, 567.

The plaintiff accordingly is entitled to relief in equity, and the decree is affirmed with costs of the appeal. *Sawyer* v. *Cook*, 188 Mass. 163.

Ordered accordingly.

LAWRENCE DOUCETTE *vs.* NATHAN SALLINGER.

Middlesex. October 17, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Unlawful Interference. Assignment, Of wages. *Proximate Cause. Damages,* In tort.

One, who serves on the employer of a workman a notice of a supposed assignment of wages by the workman, which in fact was made by a different person of the same name, and on being informed by the workman of the mistake unjustifiably refuses to withdraw the notice and thereby causes the workman's discharge, is liable to the workman in an action of tort for the damages resulting from this

unlawful interference with his employment. Following *Lopes* v. *Connolly*, 210 Mass. 487.

In such an action it appeared that the plaintiff was discharged by his employer under a rule, that "any employee executing an assignment of wages will be liable to immediate discharge," and the presiding judge refused to rule at the defendant's request that the defendant "is not bound by the rule unless it is proven that he had notice of the existence of the rule or reasonable cause to believe that such a rule existed." *Held*, that the request for the ruling was refused rightly.

In the same case the judge also refused to rule at the request of the defendant "that the employer had no right to discharge the employee so as to render the defendant liable in damages without using reasonable prudence to ascertain whether or not the L D employed was the L D described in the notice." *Held*, that the request for the ruling was refused rightly.

In the same case it was *held* that the judge rightly refused to make a ruling which assumed that the plaintiff's employer acted arbitrarily in discharging him, there being no evidence to support this assumption, it appearing clearly that the plaintiff's contract of employment was terminated because of the supposed violation of one of its conditions, namely, that the employee should not assign his wages.

In the same case it was *held* that a portion of the judge's charge was correct which, properly interpreted, stated that, if the superintendent of the plaintiff's employer without further investigation mistakenly treated the plaintiff as the maker of the assignment of wages, the defendant, without whose unlawful interference the superintendent would not have acted, was the efficient cause of the plaintiff's discharge.

In the same case it was *held* that the question, whether the defendant wilfully interfered with the plaintiff's contract of employment, was for the jury and, if they found that he did so wilfully interfere, the plaintiff was entitled to reasonable compensation for his mental distress and anxiety. Citing *Lopes* v. *Connolly*, 210 Mass. 487, 495.

TORT for wrongfully causing the discharge of the plaintiff by the Heywood Brothers and Wakefield Company, a corporation in whose factory at Wakefield the plaintiff was employed as a chair worker earning on an average $7.50 a week, by serving a notice on that corporation falsely stating that the plaintiff had made an assignment of his wages to the defendant and by wilfully refusing to withdraw such notice when informed by the plaintiff that he never had made such an assignment. Writ dated October 6, 1915.

In the Superior Court the case was tried before *Hardy*, J. The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. That upon all the evidence the plaintiff is not entitled to recover.

"2. That if the jury find that the Heywood Brothers and Wakefield Company had at the time the notice of assignment of wages was served a rule that any employee assigning his wages would be

discharged, that the defendant is not bound by the rule unless it is proven that he had notice of the existence of the rule or reasonable cause to believe that such a rule existed."

"4. If the jury find that the employer had a record or office memorandum disclosing the name and address of the plaintiff and that the notice of assignment of wages served by the defendant contained the description of the assignee as Lawrence Doucette of Woburn, that the employer had no right to discharge the employee so as to render the defendant liable in damages, without using reasonable prudence to ascertain whether or not the Lawrence Doucette employed was the Lawrence Doucette described in the notice.

"5. If the jury find that the discharge of the defendant was not a necessary consequence, or a reasonably to be foreseen result of the defendant's act, but was the arbitrary choice of the employer, then the act of the defendant was not the proximate cause of the damage and the defendant is not liable.

"6. If the jury find that the defendant in serving the notice of assignment was in good faith, relying upon his statutory right, then the plaintiff's employer had two justifiable courses open: first, to withhold wages until the court had passed upon the matter; or, second, refuse to recognize that the assignment applied to the employee and recover costs from the now defendant in case of suit brought against it and if the employer arbitrarily discharged the plaintiff without taking either of said courses, then he acted at his peril and his act, not that of the defendant, was the proximate cause of the damage and the defendant is not liable."

The judge refused to make any of these rulings and submitted the case to the jury with other instructions, described in part in the opinion. The jury returned a verdict for the plaintiff in the sum of $350; and the defendant alleged exceptions to the refusal of the rulings requested by him and to "such parts of the charge as are inconsistent with the requested rulings."

L. Marks, for the defendant.

G. M. Poland & L. P. Jordan, for the plaintiff.

BRALEY, J. The defendant transmitted to the plaintiff's employer a copy of an assignment of wages purporting on its face to have been given by the plaintiff, with a statement of the indebtedness claimed to be due. If the evidence had not gone further it

well might be contended, that in what had been done the defendant, having as the record shows a valid assignment from a person bearing the same name as the plaintiff, honestly supposed that the assignor and the plaintiff were one and the same, and to protect his rights the notice was given in good faith.

But it further appears and the jury could find, that the defendant, upon being notified by the plaintiff's counsel of the mistake in identity, declined to withdraw the notice until the plaintiff came to his place of business and satisfied him that he was not the assignor and debtor. The plaintiff was under no obligation in the forum of morals or of law to make this journey. Nor was the burden upon him to convince the defendant of his mistake and to satisfy him that he was not the debtor. *Lopes* v. *Connolly*, 210 Mass. 487, 494. The pursuer, having insistently held to his course after being notified that he was in the wrong, must take the natural and probable consequences resulting from his negligence or refusal to institute the necessary inquiries, even if when he declined to act damage to the plaintiff might not have been expected or foreseen. *Fottler* v. *Moseley*, 185 Mass. 563. *Lopes* v. *Connolly*, 210 Mass. 487. *Odgen* v. *Aspinwall*, 220 Mass. 100, 103. The defendant not only was notified September 18, 1915, that the plaintiff was an employee of the Heywood Brothers and Wakefield Company and that he had been discharged under a rule of the company properly admitted in evidence, that "any employee executing an assignment of wages will be liable to immediate discharge," but on September 23, 1915, when informed of his loss of employment by the plaintiff's counsel, declined to act, and deliberately insisted upon the enforcement of the alleged assignment. It was not until the plaintiff, who, finding that he could not be reinstated unless the assignment was withdrawn, went to the defendant's place of business "and presented himself for identification," and procured an "order for the release of his wages," that his employment was restored on October 2, 1915.

The defendant's first request, that upon all the evidence the plaintiff is not entitled to recover, manifestly could not have been given. *Lopes* v. *Connolly*, 210 Mass. 487, 494. *Kennedy* v. *Hub Manuf. Co.* 221 Mass. 136. The second request, that the defendant " . . . is not bound by the rule unless it is proven that he had notice of the existence of the rule or reasonable cause to believe

that such a rule existed," as well as the fourth request " . . . that the employer had no right to discharge the employee so as to render the defendant liable in damages without using reasonable prudence to ascertain whether or not the Lawrence Doucette employed was the Lawrence Doucette described in the notice," were denied rightly. *Lopes* v. *Connolly*, 210 Mass. 487, 494. *Leahy* v. *Standard Oil Co. of New York*, 224 Mass. 352, 360.

The fifth request assumed that the company in enforcing the rule acted arbitrarily. But there is no evidence on which to rest this assumption. The judge moreover instructed the jury " . . . if you find on all the evidence . . . that this act on the part of the defendant would not naturally lead him to believe, or naturally lead you to believe that it would necessarily inflict damage upon him, if you are satisfied of that upon this evidence, the defendant would not be liable for any damage. Of course it is for you to say upon all the evidence here what might reasonably be expected by the defendant as a man of ordinary prudence under all the circumstances." The sixth request also assumes as matter of law that the plaintiff's discharge resulted from the wrongful act of the company in which the defendant did not participate. But, as previously said, while the contract of employment could be terminated at the will of either party without assigning any reason, the uncontroverted evidence clearly shows that it was terminated because of the violation of one of its conditions, that the employee should not assign his wages. *Casavan* v. *Sage*, 201 Mass. 547. We find no error in the refusal of these requests.

The defendant also excepted "to the charge as a whole and such parts of the charge as are inconsistent with the requested rulings." The argument for the defendant under the exceptions to the charge, in so far as it is the same in substance as the argument on the refusal to give the requests, is disposed of by what has been said. It is however contended, that the jury were erroneously instructed, that, if the company wrongfully discharged the plaintiff, yet the defendant would not be released from liability. But the exact instructions which accurately stated the law are, " . . . it is possible that you may find" that the superintendent "made a mistake in discharging this man, that doesn't relieve the defendant from liability if he has been guilty of a wrongful act, if that act, if there was such an act, caused any interference with the contract whereby

the plaintiff was discharged," meaning when read with the context and as the jury must have understood, that if the superintendent without further investigation mistakenly treated the plaintiff as the assignor, the defendant, but for whose unlawful interference the superintendent would not have acted, was the efficient cause of the discharge. *Lopes* v. *Connolly*, 210 Mass. 487. *Doe* v. *Boston & Worcester Street Railway*, 195 Mass. 168, 171, 172.

It is urged further that the instructions, "The plaintiff relies upon the fact that even though this notice was served, that the defendant was notified of the fact that there was a wrongful act, that he wasn't the man, and that the defendant didn't see fit to act, he sat still in his office and concluded that the plaintiff had a great deal to do in order to convince him that it was not so. Well, that is proper for your consideration as bearing upon whether there was malice shown. You have a right to consider that as well as the original act of sending the assignment out to Wakefield. If this defendant was notified by letter — of course you will read the whole of the letter by counsel for the plaintiff — that a mistake was made, what was he, the defendant, to do? Did that necessarily throw the burden upon the plaintiff to move about it?" followed by an anecdote by way of illustration, were inconsistent with the rulings requested. The question whether the defendant wilfully interfered was for the jury, and, if they so found, the plaintiff was entitled to reasonable compensation for his mental distress and anxiety, as pointed out in *Lopes* v. *Connolly*, 210 Mass. 487, 495, where the cases are collected. *Kennedy* v. *Hub Manuf. Co.* 221 Mass. 136, 141.

The result is, that an examination of all the alleged errors in so far as argued show no ground for reversal.

Exceptions overruled.

MARY T. McDONOUGH *vs.* METROPOLITAN LIFE INSURANCE COMPANY.

Suffolk. October 17, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Practice, Civil, Ordering verdict. *Insurance,* Life.

In an action on a policy of life insurance, the defence relied upon was that the insured falsely represented in his application for the policy that he never had cancer or tumor and was then in good health, and that he never had been under treatment in any hospital and last had been treated by a physician twenty-one years before for measles, whereas an exploratory operation had been made upon the insured at a hospital, which had been discontinued because the ether affected him so badly, and there was testimony of the hospital surgeons that at that time in their opinion there was undoubtedly a cancer or a cancerous growth, and they expressed the opinion that at the date of the policy the insured had a cancerous growth and was not then a healthy man. This evidence was not contradicted. One surgeon testified that he did not tell the insured what was the matter with him. He also testified that "The only positive way of determining the existence of a malignant tumor is by a microscopic examination, that no such examination was had in this case, and except for that it is purely a matter of opinion of the different doctors based upon the symptoms they have before them." It was not conceded at the trial that the insured actually had cancer or a cancerous growth at the time the policy was issued. The judge ordered a verdict for the defendant. *Held,* that, the burden being on the defendant to show that the misstatements of the insured were made in bad faith or that their falsity increased the risk, the question of fact whether the insured had cancer or a cancerous growth when he made the application should have been submitted to the jury, because the jury might not have believed the opinions expressed by the surgeons, although they were uncontradicted.

In the same case it was *said* that, even if the presiding judge felt that the evidence establishing the fact that the insured had the disease was so overwhelming that a verdict disregarding it ought not to be permitted to stand, it was wrong to order a verdict for the defendant.

CONTRACT on a policy of life insurance upon the life of James R. McDonough, late of the part of Boston called South Boston, who was the husband of the plaintiff, the beneficiary under the policy. Writ dated June 28, 1915.

In the Superior Court the case was tried before *Brown,* J. At the close of the evidence, which is described in the opinion, the judge ordered a verdict for the defendant and reported the case for determination by this court. If on the evidence properly admitted

or improperly excluded the ordering of the verdict was right, judgment was to be entered on that verdict. If the ordering of the verdict was wrong, judgment was to be entered for the plaintiff in the sum of $482.54 with interest from April 1, 1915.

F. R. Mullin, (*P. F. Spain* with him,) for the plaintiff.

W. P. Kelley, for the defendant.

Rugg, C. J. This is an action of contract brought by the beneficiary to recover the amount of a policy of insurance issued by the defendant upon the life of her husband. The plaintiff offered in evidence the policy of insurance and the proofs of death. There was testimony to the effect that the insured appeared to be a healthy man on March 3, 1915, the date of the policy; that, being in some pain, in the previous November he went to the Carney Hospital, where an operation was performed; that a mistaken diagnosis of his case then was made; "that they cut the man open and sewed him right up again;" that "he took the ether badly, and they stopped the operation and allowed him to come out of the ether;" and that on his return from the hospital he said that there "they had operated on him and they couldn't find anything the matter with him."

The plaintiff on this evidence made out a *prima facie* case and was entitled to go to the jury if nothing more appeared.

There was evidence introduced by the defendant from the hospital surgeons to the effect that the insured came to the hospital in November, 1914, and an exploratory operation was performed on him; that the ether affected him so badly that they had to stop, and that at that time in their opinion there was undoubtedly a cancer, a cancerous growth, or a cancerous tumor on the caecum; that on March 24, 1915, a second operation was performed and the tumor was found to have increased in size; on account of its condition, no attempt was made to remove it, but another operation, a suture of the intestine, was performed and he died four days later; and that in their opinion he had a cancerous growth on the date of the policy and was not then a sound, healthy man. There was also testimony from one of these surgeons that "he never told the insured what the matter was with him after the November operation; that the man had symptoms that indicated the existence of other things rather than a malignant tumor of the intestines; that a man might have chronic inflammation down there and live

indefinitely, and that a chronic inflammation would produce many of the symptoms that were found in this case. . . . The only positive way of determining the existence of a malignant tumor is by a microscopic examination, but that no such examination was had in this case, and except for that it is purely a matter of opinion of the different doctors based upon the symptoms that they have before them." In his application for this policy, dated February 28, 1915, the insured stated, "I have never had . . . cancer or other tumor. . . . I am now in good health. . . . I have never been under treatment in any . . . hospital," and that he had last been treated by a physician twenty-one years before for measles. It was a term of the policy that "All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

It is provided by St. 1907, c. 576, § 21, that "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of loss."

It is not enough under this statute to prevent recovery that there have been misrepresentations. It must also appear that either they were made with intent to deceive or that the falsities in them increased the risk of loss. That is an affirmative defense. The burden of proving that defense and thereby defeating recovery on the policy rests on the defendant. *Barker* v. *Metropolitan Life Ins. Co.* 198 Mass. 375. *Collins* v. *Casualty Co. of America*, 224 Mass. 327, 331. It is rarely that it can be ruled as matter of law that the burden of proof has been sustained. This is especially true when the attempt to sustain that burden rests upon oral testimony introduced by the party upon whom the burden rests, and upon inferences from circumstances. *Brusseau* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 84. *Kelsall* v. *New York, New Haven, & Hartford Railroad*, 196 Mass. 554, 556. *LaFond* v. *Boston & Maine Railroad*, 208 Mass. 451, 456. *Worcester Color Co.* v. *Henry Wood's Sons Co.* 209 Mass. 105, 110. *Wood* v. *Blanchard*, 212 Mass. 53, 56. *Leary* v. *William G. Webber Co.* 210 Mass. 68, 74. *Phillips* v. *Eldridge*, 221 Mass. 103, 104.

Although there are exceptions to this general rule, (see for example *Debbins* v. *Old Colony Railroad*, 154 Mass. 402; *Emery* v. *Boston & Maine Railroad*, 173 Mass. 136; *Wakefield* v. *American Surety Co.* 209 Mass. 173, 176; *International Text Book Co.* v. *Martin*, 221 Mass. 1, 8; *Fall River* v. *Aetna Ins. Co.* 219 Mass. 454, 457; *Kerrigan* v. *Commercial Brewing Co.* 216 Mass. 306; *Dean* v. *Boston Elevated Railway*, 217 Mass. 495, 498,) the case at bar is not one of them. It falls within the general rule. It may be taken on this record to have been not open to doubt that the insured had been at a hospital and had been attended by a physician, and that the statements in his application to the contrary were not true. But it is not certain as matter of law that these misstatements were made by him in bad faith or that necessarily they increased the risk, and if neither of these facts were proved, recovery was not necessarily defeated. Whether they, or either of them, were proved or not on all the evidence was a question of fact.

If the opinions expressed in the testimony of the hospital surgeons were accepted as true, manifestly the risk of loss was increased materially by misrepresentations made by the insured in his application. If it had been conceded that these opinions were in accordance with the facts, or if the trial had proceeded on the basis that they were correct, then it could rightly have been ruled that the defense had been made out. Cancer or cancerous growth or cancerous tumor is a disease of such gravity that it is at present commonly recognized as having a tendency to shorten the life of one suffering from it. *Rainger* v. *Boston Mutual Life Association*, 167 Mass. 109. *Brown* v. *Greenfield Life Association*, 172 Mass. 498, 503. *Kidder* v. *United Order of the Golden Cross*, 192 Mass. 326, 334. But it does not appear that the trial proceeded upon the footing that the insured actually had that disease at the time the policy was issued. That was not conceded. Whether he did or not, therefore, was a question of fact, and ought to have been submitted to the jury. On the record the evidence appears to be strong that he had that disease. The single circumstance that it was uncontradicted is not enough to compel belief in its accuracy. Still the jury may have discredited the opinions expressed by the surgeons. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314, 323. In this respect the case is distinguishable from *Holden* v. *Metropolitan Life Ins. Co.* 188 Mass.

213, where evidence was necessarily taken as true or conceded. Even though the presiding judge may have felt that the evidence establishing the fact that the insured had the disease was so overwhelming that a verdict disregarding it ought not to be permitted to stand, still it was his duty to submit this question of fact to the jury. *Lee* v. *Prudential Life Ins. Co.* 203 Mass. 299, 301. *Niland* v. *Boston Elevated Railway*, 208 Mass. 476. *Wynn* v. *Provident Life & Trust Co.* 206 N. Y. 701.

It follows that the ruling directing a verdict for the defendant was wrong. In accordance with the terms of the report, judgment is to be entered for the plaintiff in the sum of $482.54, with interest from April 1, 1915.

So ordered.

JOHN H. MACALMAN *vs.* EDWARD F. GLEASON.

Suffolk. October 17, 1917. — November 27, 1917.

Present: RUGG, C. J. BRALEY, DE COURCY, & PIERCE, JJ.

Contract, In writing. *Evidence*, Extrinsic affecting writings.

In an action of contract for the price of repairs made upon a motor car of the defendant, it appeared that the defendant had bought the car from the plaintiff a few months before under a contract in writing signed by the parties, which appeared on its face to be a complete contract embracing all the particulars necessary to make a perfect agreement. It appeared further that before the sale the plaintiff had agreed orally that, if the defendant bought the car, he would guarantee it for a year, that is, "keep it in repair for a year." The defendant contended that this was a separate collateral agreement made as an inducement to the defendant to buy the car. *Held*, that the oral agreement purported to be a part of the bargain of sale and was not a mere inducement to enter into the sale, and that therefore the evidence concerning it should have been excluded and, having been admitted, could not be considered, the rights of the parties being defined by their agreement in writing.

CONTRACT for labor performed and materials furnished in repairing a motor car belonging to the defendant which he previously had bought from the plaintiff as a second-hand car. Writ in the Municipal Court of the City of Boston dated September 11, 1911.

On appeal to the Superior Court on June 3, 1912, the case was

tried before *Fox*, J. The contract in writing for the sale of the car by the plaintiff to the defendant was as follows:

"Sec-Hand Green car

Motor Car Order

"J. H. MacAlman

889 Boylston Street

Boston, Mass., December 16, 1910.

"We acknowledge receipt of your check for the sum of $1800.00 to apply upon your order entered this day as follows, viz:

"Second-hand Stearns Motor Car, Model 30/60 equipped with Chain Drive.

"G. Vaughan Body, Standard Tires and regular standard equipment. Color Body Maroon Color Running Gear Maroon Special Extras

Remarks: Equipment to include Cape top, Prest-o-Lite tank, five lamps, horn, pump, jack, and kit of tools, tire irons.

Price, inclusive of extras, $1800.00 f. o. b. Boston, Mass.

Terms: Cash upon acceptance of this proposal.

"To be delivered at Boston, Mass., on or before, at once, subject to strikes, accidents, transportation, unavoidable delays and causes beyond our control.

"It is expressly understood that, in event of failure on our part to make delivery upon the date and for the causes stated, the above payment will be refunded upon demand.

"J. H. MacAlman.

By Chas. I. Howell

Salesman.

"Accepted by Edward F. Gleason

Purchaser

By H. C. Prior

Address 535 Beacon St., Boston."

The testimony offered by the defendant in regard to an alleged oral agreement to guarantee the machine for a year, which is described in the opinion, was admitted in evidence by the judge subject to the plaintiff's exception.

The full amount claimed in the declaration was $509.53. The defendant contended that all of this except certain items amount-

ing to $113.37 was covered by the alleged guaranty. The judge submitted the case to the jury with the understanding and agreement of the parties that, if the finding of the jury was not for the full amount of the claim as set out in the declaration, namely, $509.53, the case was to be reported to this court for determination, with the further understanding that, if the evidence to prove the so called guaranty should have been excluded, judgment was to be entered for the plaintiff in the sum of $509.53. If on the other hand such evidence was admitted properly, judgment was to be entered by this court on the verdict.

The jury returned a verdict for the plaintiff in the sum of $113.37; and the judge reported the case for determination by this court with a stipulation in accordance with the understanding and agreement stated above.

F. Juggins, (*C. A. De Courcey* with him,) for the plaintiff.

F. P. Garland, for the defendant, submitted a brief.

PIERCE, J. This is an action of contract to recover $509.53 for labor alleged to have been performed on and materials furnished for a motor car purchased by the defendant from the plaintiff.

On December 16, 1910, after negotiations and numerous interviews, the plaintiff and the defendant drew up and signed a written agreement for the purchase and sale of a second-hand motor car for the price of $1,800 including extras. A copy of this agreement is printed above. At the time of the execution of the agreement the defendant paid the plaintiff the agreed price and the motor car was delivered two days afterwards. After the car had been delivered to the defendant and used by him, certain repairs becoming necessary, it was sent to the repair department of the plaintiff and the repairs were made. The defendant admitted that the charges in the items enumerated in the plaintiff's declaration were fair and reasonable but contended that the greater part thereof were covered by a contemporaneous oral agreement and guaranty of the plaintiff to keep the car in repair for one year from the date of purchase free of charge to the defendant.

It is the contention of the defendant that the oral agreement was collateral to the principal agreement and operated as an inducement for entering into it. Subject to the exception of the plaintiff, as evidence to prove the so called guaranty, the defendant was permitted to testify that the substance of the numerous

interviews was as follows: At a conversation at the defendant's house, "I said I did n't want a second hand car because they were always in the repair shop. . . . He said, 'This had been thoroughly overhauled . . . and if I bought it they would guarantee it for a year.'" To the question, "What do you mean?" the defendant answered, "Keep it in repair for a year." At an interview at the defendant's office, "I told him the car looked good, but I could not make up my mind to have a second hand car. . . . We went over the same conversation as the day before. He said there would not be anything like that in this car, that the car would be just as good as new, all the worn places thoroughly overhauled and they would guarantee it to me for a year." A third conversation was over the telephone: "He said, 'How do you feel about the car,' or something like that. I said, 'If this car as you say is thoroughly overhauled and you will guarantee it for a year, I will give $1,800 for it.' He said, 'All right. . . . We will accept your offer' and I told him I would be down. I think that was in the forenoon of December 14."

The admitted evidence tends to prove that at the time of the making of the final agreement of sale a further agreement was made that the car would be just as good as new, all the worn places thoroughly overhauled and that the plaintiff would guarantee it for a year. The writing signed by the parties appears on its face to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties. The evidence therefore should have been excluded unless the oral agreement relates to a subject independent of, distinct from, and collateral to the sale of the motor car. *Dutton* v. *Gerrish*, 9 Cush. 89. *Fitz* v. *Comey*, 118 Mass. 100. *Puffer Manuf. Co.* v. *Krum*, 210 Mass. 211, 213. *Glackin* v. *Bennett*, 226 Mass. 316.

We are of opinion that the oral agreement directly touched and concerned the use and enjoyment of the thing sold, that it was not a mere inducement for entering into the sale, that it was a part of the bargain of sale, and was not independent of or collateral to that sale. The case at bar cannot be distinguished in principle from *Brigham* v. *Rogers*, 17 Mass. 571, wherein it was held that where an estate was demised by lease, no action lay on a parol promise made by the lessor at the time of executing the

lease, that the water on the premises demised would be good, and that there would be enough of it, and if not that he would make it so. This decision was approved in *Durkin* v. *Cobleigh*, 156 Mass. 108; *Spear* v. *Hardon*, 215 Mass. 89; *Naumberg* v. *Young*, 15 Vroom, 331, 344; *Thompson Foundry & Machine Co.* v. *Glass*, 136 Ala. 648, 654.

It follows that the evidence should have been excluded, and that judgment should be entered for the plaintiff in the sum of $509.53 in accordance with the terms of the report.

So ordered.

CHARLES B. TEAGUE *vs.* JOHN B. MARTIN & another.

Middlesex. October 17, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Agency. Partnership. Motor Vehicle.

In an action against two partners, carrying on as a firm the business of roofers, for personal injuries sustained by the plaintiff from being run into when he was riding a bicycle on a highway by a motor truck belonging to the partnership and negligently driven by one of the defendants, it appeared that at the time of the accident the other defendant was on a vacation in another State and that defendant contended that his partner who was driving the truck was using it for his own private purposes at the time of the collision. The defendant who was driving the truck never had used it before except on business of the firm. He testified that when the collision occurred he had been out with the truck for more than two hours and was returning to his place of business. He testified further that at the time of the collision he was using this business truck solely for pleasure driving and that he had driven only six or seven miles. There was evidence from which it could be inferred that he was returning from an inspection of the partnership work that had been going on that day. The judge refused to rule at the request of the other defendant that there was no evidence that at the time of the accident the partner driving the truck was acting within the scope of the partnership business and that there was no evidence that the partner driving the truck was acting as the agent of the other defendant. *Held*, that the refusal to make these rulings was right.

If two partners own as partnership property a motor truck used in the partnership business, and one of the partners gives to the other permission to use the truck for pleasure trips, and if, while the partner to whom this permission is given is using the truck on a pleasure drive not on account of the business of the firm, he negligently runs down a traveller who is riding a bicycle on a highway, the absent partner, who lent his share in the motor truck to his copartner

for pleasure purposes, is not liable to the injured traveller, because the loan for the outside purpose did not create an agency.

TORT against John B. Martin and Richard J. Clark jointly, as copartners engaged in the roofing business, for personal injuries sustained by the plaintiff on the afternoon of August 25, 1915, when he was riding his bicycle across Powder House Square in Somerville, from being run into by a motor truck belonging to the defendants jointly as partners and being driven negligently by the defendant Clark. Writ dated December 20, 1915.

The defendants answered separately. The answer of the defendant Martin contained a general denial and an allegation that the plaintiff was not in the exercise of due care and was guilty of negligence which contributed to his injury.

In the Superior Court the case was tried before *Wait*, J. The evidence bearing on the liability of the defendant Martin is described in the opinion. That defendant asked the judge to make the following rulings:

"1. That upon all the evidence the plaintiff is not entitled to recover against the defendant John B. Martin.

"2. There is no evidence that the defendant Clark was lawfully acting as the agent of the defendant Martin at the time of the accident, in consequence of which the plaintiff cannot recover against the defendant Martin.

"3. There is no evidence that the defendant Clark at the time of the accident was acting within the scope of the partnership business.

"4. If the defendant Clark, without the knowledge or consent of the defendant Martin, took the auto truck and went for a ride on his own personal account and in no way on account of the business of the firm, and while so engaged collided with the plaintiff's bicycle, the defendant Martin will not be liable."

"10. There is no affirmative evidence that at the time of the alleged accident the defendant Clark was in the employ of the defendant Martin, or was acting within the scope of his employment, in the absence of which the plaintiff cannot recover against the defendant Martin."

The judge refused to make any of these rulings as requested, but gave as an instruction to the jury the fourth ruling in a modified form as follows: "If the defendant Clark, without the knowl-

edge or consent of the defendant Martin, took the auto truck and went for a ride on his own personal account and in no way on account of the business of the firm, and while so engaged collided with the plaintiff's bicycle, the defendant Martin will not be liable, unless he had authorized such use for general purposes of pleasure."

The jury returned a verdict against both defendants in the sum of $400; and the defendant Martin alleged exceptions.

J. Cummings, for the defendant Martin.

H. W. Packer, for the plaintiff.

De Courcy, J. The plaintiff, while riding a bicycle in Powder House Square, Somerville, was struck by a motor truck owned by both defendants as copartners, and driven at the time by the defendant Clark. No dispute arises as to the plaintiff's due care or Clark's negligence. The question of Martin's liability is raised by his exceptions to the judge's refusal to give the rulings requested by him numbered one, two, three and ten.

There was evidence which warranted the submission of that issue to the jury. The truck was owned by the partners, used for partnership business, registered in the firm name, and had "Martin & Clark" inscribed thereon. One of the partners was operating it at the time of the accident. All of the business of the firm on that day consisted of two roofing jobs in Watertown and Newton, and a gang of six men had been sent to do the work under the exclusive direction of a foreman. The defendant Martin was in New Hampshire on his vacation. Clark, who never had used the truck except on firm business, on his own testimony had been out with it for more than two hours, and was returning to his place of business from the direction of Newton when the collision occurred. There was testimony that there were kegs in the truck at the time. The jury well might discredit his statement that he was using this business truck solely for pleasure driving, and had driven only six or seven miles; and could infer from the facts in evidence that he was returning from an inspection of one or both of the partnership jobs, made in the absence of his copartner. *Heywood* v. *Ogasapian*, 224 Mass. 203. These four requests were denied rightly.

The fourth request was: "If the defendant Clark without the knowledge or consent of the defendant Martin, took the auto

truck and went for a ride on his own personal account and in no way on account of the business of the firm, and while so engaged collided with the plaintiff's bicycle, the defendant Martin will not be liable." The judge gave this, but added, against the objection of the defendant, "unless he had authorized such use for general purposes of pleasure." Martin's exception to this modification of his request was well taken. He would be liable for a tort committed by Clark in the course and within the scope of the business of the firm. This is on the principle that partners are the general agents of each other while so transacting the partnership business. *Moreton* v. *Hardern*, 4 B. & C. 223; *S. C.* 6 Dowl. & Ry. 275. *Linton* v. *Hurley*, 14 Gray, 191. *Fennell* v. *Peterson*, 225 Mass. 598. But in committing a tortious act which is outside of the agency or common business a partner acts only for himself, and he alone is responsible for the consequences. And the mere fact that an agent, while using the motor car of his principal for his own pleasure, is doing so with the permission of said owner, does not make that owner liable for the wrongful acts committed by the agent. A loan of the machine does not carry with it a responsibility for the negligent conduct of the borrower. *Herlihy* v. *Smith*, 116 Mass. 265. *Marsal* v. *Hickey*, 225 Mass. 170. See *Reynolds* v. *Denholm*, 213 Mass. 576.

We cannot say that the error in thus modifying the fourth request was a harmless one. It permitted the jury to find Martin responsible for Clark's negligent operation of the car, even if they credited Clark's story that he was indulging in a pleasure drive and was using the truck for a purpose in which his copartner had no interest. This exception must be sustained, and it is

So ordered.

FREDERICK G. SKERRY *vs.* SEWELL M. RICH & another.

Middlesex. October 17, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Agency. Municipal Corporations, Fire department. *Public Officer.*

Where the chief of the fire department of a city was being carried to a fire in a motor car operated by a member of the fire department, who, while not acting under the personal direction or orders of his chief, lost control of the car through his negligence in driving it at an excessive rate of speed, and the car, crossing the sidewalk of a public street, struck and injured a traveller thereon, the traveller cannot recover damages for his injuries from the chief of the fire department, the member of the fire department whose negligence caused the injury not being an employee or agent of such chief.

TORT against Sewell M. Rich and Harold Butler, respectively the chief of the fire department of Somerville and a member of that department, for personal injuries sustained on the evening of May 23, 1913, when the plaintiff was travelling on foot on the sidewalk of Cutter Street in Somerville, by being run into by a motor car in which both of the defendants, as alleged, were driving negligently at an excessive and unreasonable rate of speed. Writ dated December 4, 1914.

In the Superior Court the case was tried before *Keating*, J. It was stated in the report that "both defendants were acting in discharge of their duties as public officers at the time of the accident."

In answer to a special question submitted to them by the judge the jury found that the defendant Butler was negligent. By order of the judge the jury returned a verdict for the defendant Rich. The jury returned a verdict for the plaintiff in the sum of $433.83, and at the request of the plaintiff the judge reported for determination by this court the question whether the ordering of the verdict for the defendant Rich was right, with the stipulation that, if the judge's action in ordering that verdict was correct, judgment was to be entered for the defendant Rich on the verdict. If the ordering of the verdict was erroneous, judgment was

to be entered for the plaintiff against both the defendants in the sum found by the jury against the defendant Butler.

W. P. Murray, for the plaintiff.

F. P. Garland, for the defendants.

BRALEY, J. The plaintiff having obtained a verdict against the defendant Butler, the only question is, whether the verdict for the defendant Rich was ordered rightly. The defendants, being members of the fire department of the city of Somerville and in the discharge of their respective duties at the time of the accident, were public officers, and, not being servants of the municipality, they were not fellow servants.

A public officer undoubtedly is liable for personal acts of misfeasance. But, even if Rich was the chief of the department in which Butler was a subordinate and both were riding to the fire in an automobile driven by Butler, there is no evidence which would have warranted the jury in finding that Butler when he lost control of the car through excessive speed was acting under the personal direction or orders of his chief. It follows that Butler, through whose negligence alone the plaintiff was injured, was not an employee or agent of Rich, and the doctrine of *respondeat superior* is inapplicable. *Moynihan* v. *Todd*, 188 Mass. 301, 305, 307. *Farrigan* v. *Pevear*, 193 Mass. 147, 151. *Barry* v. *Smith*, 191 Mass. 78, 91. By the terms of the report judgment for the defendant Rich is to be entered on the verdict.

So ordered.

CHARLES S. BRUCE *vs.* IDA M. MESERVE.

Middlesex. October 17, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Broker. Agency, Broker's Commission.

If a real estate broker is employed as the exclusive agent of a landowner to sell a certain parcel of land, and if, after the broker has reported to the landowner an offer from a proposed purchaser, which the landowner refuses, the landowner without the knowledge of the broker makes an oral agreement with the proposed purchaser to sell the land to him at a higher price, which is reduced to writing but is signed only by the landowner and which the proposed purchaser afterwards refuses to carry out at the price named, because the parcel contains

less land than he thought it did, and brings an action against the landowner for $500 which he had deposited under the oral agreement, the broker is not entitled to a commission.

CONTRACT by a real estate broker to recover $312.50 as a commission for procuring a customer to purchase from the defendant certain real estate numbered 454 on Massachusetts Avenue in Lexington. Writ dated May 23, 1916.

In the Superior Court the case was tried before *Hardy*, J. At the close of the evidence, which is described in the opinion, the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $319.48. The defendant alleged exceptions.

H. H. Fuller, for the defendant.

J. L. Sheehan, (*F. W. Miller, Jr.*, with him,) for the plaintiff.

RUGG, C. J. This is an action by a broker to recover a commission for procuring a customer to buy the defendant's real estate. There was evidence from which it might have been found, as the view most favorable to the plaintiff, that he was appointed by the defendant exclusive agent to get "a purchaser for the sale of her Massachusetts Avenue property;" that he was familiar with the property and told her it was well worth eleven or twelve thousand dollars; that he secured an offer of $11,000 from one Viano, and that when this was communicated to the defendant she replied, "When he offers $11,000 for it, he will give $11,700;" that subsequently the plaintiff was told that an agreement had been made with Viano for the sale of the property for $12,500; but the plaintiff had no participation in the making of it. The facts about the alleged agreement were that the defendant and Viano had some negotiations, as a result of which Viano orally offered $12,500 and she accepted that offer. Thereafter he prepared a paper, which she signed and which he did not sign, of this tenor: "I agree to sell to Mr. Felix Viano my property on 454 Mass. Ave., Lexington, twelve thousand five hundred dollars, and I receive five hundred dollars as deposit and as part payment. Balance to be payed June 1, 1916, I agree to give clear title free from all incomance, and also a plan of land to show about 75 feet front." The $500 was paid to her. It appeared on a survey

of the lot that its frontage on the street was seventy-one and one tenth feet. Viano refused to take the lot unless a reduction was made in the price "at the rate of about $166 a foot for four feet, which he said were missing." The defendant declined to make the reduction. Viano has brought an action against her to recover the $500 paid by him.

The plaintiff is not entitled to recover on these facts. The plaintiff's agreement in substance was that he should procure a purchaser able, ready and willing to buy the defendant's property at a price satisfactory to her. It would not have been necessary for him to procure the execution of a contract to buy binding upon the purchaser. *Fitzpatrick* v. *Gilson*, 176 Mass. 477. *Leland* v. *Barber*, 228 Mass. 144. He did not perform that agreement. If it be assumed that Viano was able to buy the land, the only offer which the plaintiff secured from him was $11,000, and that offer the defendant refused. If it be also assumed that she stated to the plaintiff that an offer of $11,700 would be accepted, the plaintiff did not act on that statement or at least did not procure that offer and manifestly it subsequently was withdrawn by her before the conclusion of her negotiations with Viano.

The plaintiff's agreement with the defendant would have been performed to the extent that he as exclusive agent to get a buyer might recover, if the defendant had made either an actual sale to the customer introduced by him, or an agreement binding such customer to buy. *Rice* v. *Mayo*, 107 Mass. 550. *Ward* v. *Cobb*, 148 Mass. 518. *Johnson* v. *Holland*, 211 Mass. 363. *Hutchinson* v. *Plant*, 218 Mass. 148, 153. But she did not do either. There was no sale. There was no agreement binding Viano to buy. The agreement was signed by the defendant alone and only bound her to sell. Viano did not sign it. Since the agreement concerned the sale of land, he could not be compelled in equity to perform it, nor be required by action at law to pay damages for its breach. An unperformed oral contract respecting land affords no ground for relief under the statute of frauds.

The defendant was ready to sell her lot of land for $12,500. The lot of land for which Viano was ready to pay that price was a lot of land having a frontage of seventy-five feet. The defendant did not own and could not sell such a lot of land. Viano refused to pay the price demanded by the defendant for the lot of

land which she owned. Therefore there was no customer able, ready and willing to buy the lot owned by the defendant at the price asked by her. Since there was no actual sale of the defendant's lot, no contract binding Viano to purchase the defendant's lot, and Viano was not ready to buy the defendant's lot at the price which she demanded, there is no ground on which the plaintiff can recover. *Clark* v. *Bonner*, 217 Mass. 201. *Woods* v. *Matthews*, 224 Mass. 577, 584, 585.

Cases relied on by the plaintiff, such as *Cohen* v. *Ames*, 205 Mass. 186, 188, and *Taylor* v. *Schofield*, 191 Mass. 1, 4, are distinguishable on the ground that in those cases the failure to complete the sale was due to the refusal of the landowner and not of the proposed purchaser. The mere omission of the landowner to procure a contract binding upon the proposed purchaser does not entitle the broker to his commission under the circumstances here disclosed. As a precaution it may be added that nothing is intimated as to the merits of the action at law of Viano against the defendant.

The exceptions must be sustained and, as the case appears to have been fully tried on its merits, and discloses no basis for recovery by the plaintiff, judgment is to be entered for the defendant under St. 1909, c. 236.

So ordered.

MICHAEL J. MURRAY, administrator with the will annexed, *vs.* NICHOLA FIORENTINI.

Middlesex. October 18, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & CARROLL, JJ.

Probate Court, Appeal, License to sell real estate. *Insolvent Estates.*

On an appeal from a decree of the Probate Court in which the objections to the decree appealed from were the same as those stated in *Murray* v. *Cangiano*, *ante*, 435, and where there was no report of the evidence, it was *held* that there was nothing to support any of the objections stated.

On an appeal from a decree of the Probate Court, where the question was not open under the objections filed, it was *said* that it was unnecessary to consider whether the appealing party was a creditor of a certain deceased person and, if he was, whether such a creditor, after the estate of the deceased person had been repre-

sented insolvent, was a person aggrieved within the meaning of R. L. c. 162, § 9, by a decree of the Probate Court granting a license to sell real estate of the deceased for the payment of debts.

PETITION, filed in the Probate Court for the county of Middlesex on October 20, 1916, by Michael J. Murray, administrator with the will annexed of the estate of Lucido Capozzoli, late of Medford, for leave to sell for the payment of debts and charges of administration certain real estate standing in the name of one Michael Cangiano, having been conveyed to him fraudulently by the plaintiff's testator while the testator was insolvent and was known to Cangiano to be insolvent.

The Probate Court made a decree authorizing the petitioner to sell at public auction the whole of the parcel of real estate in question.

Nichola Fiorentini of Boston filed an appeal from the decree, alleging that he was a creditor of Lucido Capozzoli, late of Medford, and interested in his estate. He filed his objections to the decree, which were identically the same as those filed by Michael Cangiano in the case of *Murray* v. *Cangiano*, which are printed, *ante*, on pages 435, 436.

The petitioner filed a motion to dismiss the appeal. The case was heard by *Pierce*, J., who made a final decree that the appeal be dismissed. Nichola Fiorentini appealed from the final decree.

The case was submitted on briefs.

J. E. Crowley, for the respondent.

F. M. Carroll & G. E. Richardson, for the petitioner.

CARROLL, J. The statement of objections to the decree of the Probate Court is the same as that filed in the case of *Murray* v. *Cangiano*, *ante*, 435. There is no report of the evidence, and for the reasons stated in that case the decree must be affirmed.

It therefore becomes unnecessary to consider whether there was evidence tending to show that the appealing party was a creditor of the deceased, and, if he was, whether such creditor, after the estate has been represented insolvent, is a person aggrieved by a decree of the Probate Court granting a license to sell real estate to pay debts and entitled to appeal therefrom to the Supreme Judicial Court, R. L. c. 162, § 9, as to which see *Henry* v. *Estey*, 13 Gray, 336; *Leyland* v. *Leyland*, 186 Mass. 420.

Decree affirmed.

ALFRED C. VINTON, administrator with the will annexed, *vs.* MARLAND L. PRATT & others.

Suffolk. October 18, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Power. Equity Jurisdiction, Marshalling assets. *Insolvent Estates.*

An appointment of property made by the donee of a testamentary power to a creditor of such donee for the purpose of discharging the obligation of a guaranty in writing, where the estate of the donee has been represented insolvent and commissioners have been appointed under R. L. c. 142, § 2, gives the appointee no priority over other creditors of the donee's estate.

BILL IN EQUITY, filed as amended in the Supreme Judicial Court on February 3, 1917, by the administrator with the will annexed of the estate of William H. Weston, late of Boston, for instructions as to the claim of the defendant Marland L. Pratt, which is described in the opinion.

The case was heard by *Loring,* J., upon the pleadings and certain facts which were agreed to. The substance of the facts is stated in the opinion. The single justice made a final decree by which the plaintiff was instructed "that it is not his duty to pay to the defendant Marland L. Pratt any of the sums claimed by said Pratt under the appointment made to him in the will of William H. Weston and the agreements set forth in the bill in priority to the payment of the claims of the other creditors of the estate of said William H. Weston."

The defendant Pratt appealed.

A. C. Vinton, administrator, *pro se,* stated the case.

H. R. Bailey, (*J. H. Stone* with him,) for the defendant Pratt.

H. Wheeler, for the defendant American Surety Company of New York.

W. C. Cogswell, for the defendants Jenkins, Cogswell and Wood, relied on the brief of the American Surety Company of New York, and filed another brief *pro se* as trustee.

BRALEY, J. The residuary clause of Nathaniel Weston's will as modified by the codicil, after making certain bequests to his

uncle and his uncle's daughters, provided that the residue is "to be invested and the income to be paid to my nephews Edward S. Weston, Henry E. Weston and William H. Weston during their lives. As each nephew dies, the share in the principal from which he derived his income shall be paid over to his issue, if any, and in default of issue to whomsoever he may by will, devise and bequeath the same or order it to be paid over to. And in default of issue and a testamentary disposal of the same to my heirs at law. If issue take, they take in the same manner as if the deceased had died intestate, possessed of the same." William H. Weston died without issue, and exercised the power of appointment as follows: "I give and bequeath to Marland L. Pratt of said Boston so much of my estate, real and personal, and so much of the estate, real and personal, over which I have power of testamentary disposition under the will of the late Nathaniel Weston, as may be necessary to make up the whole, or any balance then outstanding and not repaid, of the sum of Twenty five thousand dollars, invested by said Pratt in the Crows Nest Mining Company's capital stock, for which investment Henry E. Weston and myself became guarantors under the terms of a memorandum of agreement made and entered into by and between said Henry E. Weston and myself of the first part and said Marland L. Pratt of the second part dated the First day of May A. D. 1897, together with accrued interest unpaid thereon at six percentum as in said agreement mentioned; hereby making said devise and bequest a first charge upon my said estate after the payment of my funeral and testamentary expenses, and directing my executor hereinafter named to ascertain what amount is so outstanding and not repaid upon said investment with interest up to the date of the probate of my will, and as soon as possible to realize the amount so found to be outstanding and not repaid out of my estate, with power to sell and convey so much of my real estate as may be necessary for that purpose after the exhaustion of my personal estate, and to pay said amount to said Marland L. Pratt."

The estate however having been represented to be insolvent and commissioners having been appointed under R. L. c. 142, § 2, whose report is now pending for confirmation, the plaintiff asks to be instructed whether as administrator with the will annexed he shall pay to Pratt the donee's share of the principal in whole

or in part, which has been received from the trustee under the donor's will, or whether this share has become assets of the estate for the benefit of creditors. It is settled that by the exercise of the power the property if necessary could be applied in satisfaction of the donee's debts. *Clapp* v. *Ingraham*, 126 Mass. 200. *Tuell* v. *Hurley*, 206 Mass. 65. *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588. *Walker* v. *Treasurer & Receiver General*, 221 Mass. 600, 602, 603. *Gardiner* v. *Treasurer & Receiver General*, 225 Mass. 355. *Clarke* v. *Treasurer & Receiver General*, 226 Mass. 301. The origin of the rule in equity and its application are referred to, and commented on, in *Clapp* v. *Ingraham*, where it was said that, although title passes under the will of the donor, yet the rule cannot be set aside, "because of doubts of the technical soundness of the reasons on which it was originally established." A very full discussion may be found in *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231, 246, 247, 270. It has become a rule of property, and having been unchallenged for nearly forty years we cannot agree with the defendant, that it should be overset. *Boston Safe Deposit & Trust Co.* v. *Collier*, 222 Mass. 390, 395, 396.

But, as he further contends the rule applies only to gratuitous appointees and that being an appointee for value he is entitled to the bequest notwithstanding the insolvency of the estate, the business relations of the parties referred to in the will, which led to the bequests, are important. The defendant not only admits but joins in all the material allegations of the bill, from which as well as from the agreed facts it appears that the donee and Henry E. Weston executed an agreement under seal reciting that the Westons were promoting the organization of a corporation to operate a gold mine, and agreed when the corporation was organized to deliver to him properly signed and executed twelve thousand shares of the capital stock "fully paid and non-assessable" for the sum of $25,000. They also jointly and severally covenanted to save him harmless thereon, and further to secure the defendant for his investment, guaranteed the repayment of the money with interest at six per cent per annum payable annually, the principal sum to be repaid within three years from the date of the agreement. It was further stipulated, that ". . . as security as aforesaid each of the said Westons to make in due form a last will and testament devising and bequeathing the property

over which they have a power of disposition as provided in said will of Nathaniel Weston to said Pratt to an amount sufficient to pay and discharge the liability assumed by the parties of the first part, and not to alter said bequests to him until said Pratt shall have been paid his original investment and interest." The defendant thereupon made the investment, subsequently increased by the amounts shown in the supplemental agreements, which while guaranteeing repayment contained no provision that the power of appointment should be security therefor. The defendant paid for all the stock he agreed to take, but the Westons with the exception of two small payments failed to pay either the interest or to refund the sums invested. The capital stock having become worthless, as the company eventually failed and the corporation was dissolved, the defendant could have sued at law for reimbursement of the amounts with interest. *Elliot* v. *Hayes*, 8 Gray, 164. But he could not have maintained a bill in equity to compel specific performance of so much of the agreement as relates to the exercise of the power, or if a will had been duly executed in conformity with the agreement, to enjoin its revocation. *Crawford* v. *Langmaid*, 171 Mass. 309. *Farmers' Loan & Trust Co.* v. *Mortimer*, 219 N. Y. 290. Nor could the property, if the agreement were not performed, be charged with a trust in favor of the defendant. *Wilks* v. *Burns*, 60 Md. 64. And, if the power had not been exercised, the defendant's only remedy would have been an action for damages if the donee's estate had been solvent. *Crofut* v. *Layton*, 68 Conn. 91. It is settled, that, in so far as the bequest is made payable from the testator's own estate or general assets, it would be subject to the payment of debts. *Harmon* v. *Weston*, 215 Mass. 242, 248, and cases cited. The testamentary power however could not be exercised before the time intended by the donor of the power, and the will of the donee who had been given absolute dominion over the power speaks only at his death. *Sewall* v. *Wilmer*, 132 Mass. 131, 134. *Whipple* v. *Fairchild*, 139 Mass. 262. *Curley* v. *Lynch*, 206 Mass. 289. If the power then had remained unexecuted, the issue of the donee if any, or upon failure of such issue, the heirs at law of the donor would have come into possession of the property. But, having been executed, and his estate being insolvent, the property as we have said became assets to be applied in payment of debts which

are to be ascertained as of the date of his death. *Williams* v. *American Bank*, 4 Met. 317, 322, 323. R. L. c. 142. We find nothing affecting this principle in *Patterson* v. *Lawrence*, 83 Ga. 703, cited and relied on by the defendant. The court expressly say, "it is not shown that deceased did not have sufficient assets to pay the plaintiffs' claim," and "whether the execution of a general power of appointment would convert an estate into assets in equity for the payment of debts" is not decided. The defendant moreover held no security which upon the death of the debtor he could apply in satisfaction of his claim, but takes under the will, even if the donee used the power in satisfaction of the demands of a particular creditor to whom he had guaranteed reimbursement if the investment resulted in a loss. *Mutual Life Ins. Co.* v. *Everett*, 13 Stew. 345. *Taylor* v. *Allhusen*, [1905] 1 Ch. 529. *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231, 264. And, when all the assets are marshalled as they must be for the payment of debts, the defendant's bequest, whether treated as a gift or as a preferential appointment, must abate even to the point of extinction, leaving him to share with all the testator's creditors, among whom distribution is to be made as the court of probate may determine. R. L. c. 142. *Tuell* v. *Hurley*, 206 Mass. 65. *Fleming* v. *Buchanan*, 3 DeG., M. & G. 976, 980. *Beyfus* v. *Lawley*, [1903] A. C. 411.

The decree of the single justice being in conformity with these views should be affirmed.

Ordered accordingly.

HENRY J. MARCHANT, administrator, *vs.* BOSTON AND MAINE RAILROAD.

Essex. October 18, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

'*Negligence*, Railroad, Causing death, Contributory.

In an action against a railroad corporation under St. 1906, c. 463, Part I, § 63, for causing the death of the plaintiff's intestate, a child two years and five months of age, when she was travelling alone over a grade crossing before the enactment of St. 1914, c. 553, it appeared that the plaintiff's intestate was living with her aunt and that the aunt gave permission to her daughter, seven years of age, to go to a public playground and to take the intestate with her, telling her

"to take good care of her and hold her hand," knowing that the children had to cross the railroad tracks to get to the playground and that it was a dangerous crossing, that the children got safely to the playground and there met a boy nine years of age, with whom the girl of seven got on a tilt and "was having a great time there playing on the seesaw," forgetting completely about the intestate, who met a boy four years of age and wandered with him out of the playground until they got to the grade crossing, where the intestate was run over and killed. *Held*, that, the intestate being incapable of exercising care, the administrator must prove, in order to recover under the statute, the exercise of due care on the part of her custodian; that the question of the due care of the aunt was for the jury, but that the girl of seven, to whose charge the intestate had been confided, could not have been found to have exercised any care of her whatever, and that a verdict should have been ordered for the defendant.

TORT by the administrator of the estate of Helen I. Marchant against the Boston and Maine Railroad, a corporation, for causing the death of the plaintiff's intestate on the afternoon of July 10, 1913, when the intestate was two years and five months of age, by negligently running into her at the grade crossing of the defendant's tracks with Elliott Street in Beverly. Writ dated May 26, 1914.

The declaration contained two counts, the first under St. 1906, c. 463, Part I, § 63, and the second alleging a failure to give the signals required by law.

In the Superior Court the case was tried before *Quinn*, J. The evidence relating to the exercise of care by the persons in charge of the plaintiff's intestate is described in the opinion. At the close of the evidence the defendant asked the judge to order a verdict for it on six grounds. The first three, which related to an alleged absence of negligence on the part of the defendant, were waived by the defendant. The other grounds were as follows:

"4. There is no evidence that Helen I. Marchant was in the exercise of the due care required by St. 1906, c. 463, Part I, § 63.

"5. There is no evidence that the persons in charge of said Helen I. Marchant were in the exercise of the due care required by St. 1906, c. 463, Part I, § 63.

"6. At the time of the accident Helen I. Marchant was walking or being upon the defendant's railroad contrary to law and the reasonable rules and regulations of the defendant."

The judge refused to order a verdict for the defendant and submitted the case to the jury, who returned a verdict for the plaintiff on the first count in the sum of $3,000 and returned a

verdict for the defendant on the second count. After the verdict was returned the clerk of the court by order of the judge addressed to the foreman of the jury two questions, which with their answers were as follows:

1. "Does the jury find, on the first count, that the gate tender was negligent?" The foreman answered, "They did, sir."

2. "Does the jury find, on the first count, that the negligence of the gate tender contributed to the accident?" The foreman answered, "They did."

The defendant alleged exceptions.

C. A. Wilson, (*H. R. Bacon* with him,) for the defendant.

J. J. Ronan, for the plaintiff.

PIERCE, J. This is an action of tort to recover for the death of the plaintiff's intestate, Helen I. Marchant. The evidence was ample to support a finding that the intestate was struck by a train owned and operated by the defendant, while the intestate was travelling over a grade crossing of the defendant's road upon Elliott Street, a public highway in Beverly.

The accident occurred on July 10, 1913, and the intestate, (hereinafter called Helen,) aged two years and five months, was instantly killed. On the day of the accident and for some weeks before, Helen was living with her aunt. On the afternoon of the day of the accident the aunt gave permission to her daughter Evelyn, aged seven, to call for Marie, aged seven, to go down to the playground; she also gave Evelyn permission to take Helen, with an admonition "to take good care of her and hold her hand." She knew that the children had to cross the railroad tracks to get to the playground; that it was a "dangerous crossing," that a great many trains ran over it; that sometimes trains went over it very fast and were liable to come at any moment; that when the children got out of her sight they would begin to play, that they might be liable to stop on the street and play. She testified, "I knew, if I stopped to think of it, that Evelyn and Helen might meet some little friends and not go to the playground, but play in the street. I knew that Helen was less than three years old. I knew that Evelyn had a good many friends of her own age in that neighborhood and that when Evelyn and Helen got on to the playground they could take up whatever amusement either one wanted to and would be liable to do that. They have sand

for those little children to sit down in and play and the teacher is there for that. I knew that when they got to the playground that Evelyn might go her way to play and little Helen might go her way. I knew that there was not any gate on the playground, but an open space there that the children could go out. I knew that it was likely that Helen might go wandering out through the gate on to the street unattended. I knew that if she got out on to the street unattended she was likely to get out on to this railroad crossing. I knew that she was a little bit of a tot, unable to take care of herself." The aunt's station in life, her cares, her household duties and her family were made plain to the jury.

After leaving their home Evelyn and Helen went over the Cabot Street crossing to the home of Marie, and thence the three children went over the Cabot Street crossing again, down Elliott Street and over the Elliott Street crossing to the playground, the entrance to which is one hundred and seventy feet from the nearest point to the crossing. After passing through the opening or space for them to get in Evelyn testified, "Marie and I played around before we saw Leo. I don't remember what Helen was doing." "Leo got on the tilt with me. . . . Then Leo and I went seesawing." "Helen was watching us on the seesaws. I did not say anything to her after I got on the tilts. . . . I don't know how long Helen stayed near the tilting boards while we were tilting . . . I did not see Helen again until I went to look for her. I was having a great time there playing on the seesaw. I kept seesawing as long as I wanted to, but I don't know how long." Leo, aged nine, testified: "My sister Evelyn and a girl named Marie were with Helen. . . . The three were near the tilts. Evelyn and I were on one tilt and Marie and another girl on another one. Helen was right near the tilts with us. I saw Helen and Evelyn when they came to the playground that afternoon. The tilts were the first things I went to. . . . The last I saw of Helen she was around the tilts with us. . . . I didn't see Helen leave the playground. About fifteen minutes after I had seen her watching us I went looking for her around the playground. I didn't find her, and then, after we were looking around for about five minutes we heard the whistle on the train."

While Evelyn was engaged in seesawing on the tilt with Leo,

it could be found that Helen met Johnnie, aged four, who had been sent home by his brother Leo, but had not obeyed; that together the two children went out of the playground and along the path leading to Elliott Street; that they loitered for a short time in the gutter near the playground on the west side of Elliott Street and south of the railroad tracks; that they passed from the sidewalk near to the gutter over the west bound tracks and the east bound tracks to a point upon the grade crossing near to the location of a street railway at the easterly end of the crossing; that there, upon the planks just outside the northerly rail of the east bound track, Johnnie, frightened by the noise and sight of an approaching train, released the hand of Helen, which he was holding, and fled to a place of safety; while Helen, apparently dazed, stood still until she was struck down and killed by the step or beam of the engine.

The accident taking place before the passage of St. 1914, c. 553, after ruling rightly as a matter of law that Helen was too young to be capable of taking care of herself, the presiding judge submitted to the jury the question of the due care of the aunt when she committed Helen to the custody and oversight of Evelyn, with full and accurate instructions. We are of opinion that the issue presented was one of fact for the consideration of the jury on all the evidence.

The presiding judge submitted also to the jury the question of the due care of Evelyn. In an action of tort for negligence it is the settled law in this Commonwealth that an infant plaintiff, incapable of exercising due care on its own behalf, must prove that its custodian in fact exercised the degree of care which the law requires to be exercised by that person in the reasonable conduct of his own life. *Casey* v. *Smith*, 152 Mass. 294. We assume Evelyn was bound to conduct herself in the care of Helen as children of her age would reasonably be expected to do. *Collins* v. *South Boston Railroad*, 142 Mass. 301. *Travers* v. *Boston Elevated Railway*, 217 Mass. 188. Applying the rule to the undisputed facts, there is no evidence that Evelyn exercised any care of Helen whatsoever after the playground was reached; she ceased on their arrival to guard and protect Helen, allowed her to wander about at will, and herself became lost to the duty she had undertaken in the pleasure afforded by the tilt. The

failure to care for Helen was a neglect and abandonment of duty and was not a temporary failure to perform that duty.

Moreover, the evidence is absolute that at the time and moment of the accident neither Helen nor any one on her behalf was in the active and actual exercise of due care. *Garabedian* v. *Worcester Consolidated Street Railway*, 225 Mass. 65.

It follows that the requests "4. There is no evidence that Helen I. Marchant was in the exercise of the due care required by St. 1906, c. 463, Part I, § 63," and "5. There is no evidence that the persons in charge of said Helen I. Marchant were in the exercise of the due care required by St. 1906, c. 463, Part I, § 63," should have been given, and the second question should not have been submitted to the jury. The exceptions are sustained, and judgment is to be entered for the defendant. St. 1909, c. 236.

So ordered.

WILLARD H. BAILEY *vs.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

MILDRED HODGERNEY *vs.* SAME.

LOUIS J. HODGERNEY *vs.* SAME.

ROSA HODGERNEY *vs.* SAME.

Worcester. October 19, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Street railway, Motor vehicle, In use of highway, Contributory, Imputed. *Law of the Road.*

If a motorman operating a street railway car sees, or ought to see, a motor car approaching on the highway a thousand feet or more away and fails to comply with a rule of the street railway corporation employing him, which makes it his duty to shut off the brilliant headlight of his car, and, if also when the approaching motor car gets on the track a short distance in front of him he fails to apply the brakes and, even when his car has come in contact with the motor car, he for some time makes no effort to put on the reverse, in actions afterwards brought against the street railway corporation by persons who were travelling in the motor car for injuries sustained by reason of the collision, there is evidence of negligence of a servant of the defendant.

If the owner of a motor car is driving it on a highway between eight and nine o'clock on the evening of the fourth of July and has only his side lights lighted,

his headlights being extinguished, and, overtaking a carriage ahead of him which he does not see until he is within eighteen or twenty feet of it, he looks to the left and sees a motor car approaching on that side and then, in violation of the law of the road, attempts to pass on the right of the carriage, although he knows that an electric street railway car is approaching on that side, thinking that he has room to pass in safety and being blinded by the rays from the headlight on the street railway car so as to misjudge the distance between the carriage and the car track, and if the street railway car is operated negligently and runs into his car and he brings an action against the street railway corporation for his injuries thus caused, it cannot be said as matter of law that the presumption of his due care created by St. 1914, c. 553, is entirely overcome by the facts stated above and he is entitled to go to the jury on the issue of his due care.

Together with the case stated above there were tried actions by three other plaintiffs who were travelling in the same motor car as guests of the owner at the time of the collision described above, and it appeared that these other plaintiffs did all that reasonably could be expected from invited guests in the way of looking out for their safety, and, the jury having found that the first plaintiff who was operating the motor car as its owner was in the exercise of due care, it was *said* that no question arose as to whether, if the owner had been found to have been negligent, his negligence could have been imputed to the other plaintiffs.

FOUR ACTIONS OF TORT, the first for damage to a motor car owned and operated by the plaintiff and each of the other three actions for personal injuries sustained while travelling as invited guests in the motor car of the plaintiff in the first case, such damage and injuries having been incurred between eight and nine o'clock on the evening of July 4, 1915, by reason of a collision of the motor car with a street railway car owned by the defendant and alleged to have been operated negligently by the defendant's servants on Grafton Street leading from the town of Grafton to the city of Worcester. Writs dated July 19, 1915.

In the Superior Court the four cases were tried together before *White*, J. The material evidence is described in the opinion. The rule of the defendant, there referred to, was as follows:

"Headlight, Arc, Use of. Arc headlights must not be used at places prohibited by ordinance or special instructions. When approaching a vehicle moving in the opposite direction, the arc light must be turned out, provided it can be done without endangering the safety of car or persons, or in case of doubt, stop car."

At the close of the evidence the defendant asked the judge to order a verdict for the defendant in each case. The judge refused to do this. The defendant then asked the judge to rule in each of the three Hodgerney cases, as follows:

"1. On all the evidence the plaintiff cannot recover and the verdict must be for the defendant.

"2. The lack of care on the part of the driver of the automobile is imputed to the plaintiff, and if the driver of the automobile is guilty of contributory negligence the plaintiff cannot recover.

"3. There is no evidence of negligence on the part of the defendant company which was the proximate cause of the injury to the plaintiff."

The defendant asked the judge to rule in the case of Willard H. Bailey as follows:

"On all the evidence the plaintiff cannot recover and the verdict must be for the defendant."

The judge refused to make any of these rulings and submitted the cases to the jury. The jury returned a verdict for the plaintiff in each of the four cases, in the case of the plaintiff Bailey in the sum of $350, in the case of Mildred Hodgerney in the sum of $100, in the case of Louis J. Hodgerney in the sum of $15 and in the case of Rose Hodgerney in the sum of $500. The defendant alleged exceptions.

The cases were submitted on briefs.

C. C. Milton, J. M. Thayer & F. H. Dewey, for the defendant.

J. F. McGrath & W. I. McLoughlin, for the plaintiffs.

DE COURCY, J. These actions, which were tried together, arose out of a collision between a street railway car of the defendant and an automobile owned and operated by the plaintiff Bailey. A verdict has been returned in his favor for damage to the machine; and the other plaintiffs, who were travelling with him, have verdicts for the personal injuries sustained by them.

1. The jury were warranted in finding that the motorman was negligent. For a thousand feet or more the approaching automobile was within his view, yet he failed to shut off the brilliant headlight on his car until after the collision, in violation of the rule adopted by his employer for the safety of persons in the situation of these plaintiffs. *Stevens* v. *Boston Elevated Railway*, 184 Mass. 476. There was also evidence that he not only failed to apply the brakes when the automobile got upon the track a short distance in front of him, but that he made no effort to put on the reverse for some time after the car came in contact with the automobile.

2. On the testimony of the plaintiff Bailey, there is much to indicate that the accident was due in part to his own contributory negligence. The collision occurred between eight and nine o'clock on the evening of July 4, 1915. He was running his car with his headlights extinguished and only the small side lamps lighted, and did not see the carriage which was proceeding ahead of him until he was within eighteen or twenty feet of it. Instead of then coming to a stop, as he might have done, he looked out to the left, observed that an automobile was coming toward him on that side, and then in violation of the law of the road, R. L. c. 54, § 2, endeavored to pass on the right the carriage in front of him, although he knew that the electric car was approaching. *Perlstein* v. *American Express Co.* 177 Mass. 530. On the other hand there was evidence that he thought he had room enough to pass in safety, and that he was so blinded by the rays from the headlight on the electric car as to misjudge the distance between the carriage and the car track. We cannot say as matter of law that the presumption of due care, to which he is entitled under St. 1914, c. 553, was entirely overcome by the evidence to the contrary. In the opinion of a majority of the court the issue of his due care was for the jury on the presumption and the testimony.

3. The due care of the plaintiffs in the three other cases plainly was for the jury, regardless of the statutory presumption in their favor. On the evidence each did all that reasonably could be expected of an invited guest in the way of looking out for his or her safety. And as the due care of Bailey was for the jury, who found in his favor, no question arises of the imputability to the other plaintiffs of negligence on his part. See *Bullard* v. *Boston Elevated Railway*, 226 Mass. 262.

Exceptions overruled.

JOHN SCANLON *vs.* UNITED CIGAR STORES COMPANY.

Worcester. October 19, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Invited person.

If a dealer occupies a store with a basement beneath it where packages of goods delivered in the course of business are received, and it is customary for persons delivering goods there to go round by the outside to the store on the floor above to notify some one there that they have goods to deliver, whereupon some one goes with them while the packages are delivered, and, if a man coming with goods to deliver finds no one in the basement and, finding a cellar door open which on his previous visits he had found locked, he enters and deposits a barrel of goods, and then, groping about in the dim light in search of some one to report to, he falls into a hole six feet deep and is injured, he cannot recover for his injuries in an action against the dealer, because he was not invited to enter the cellar, the fact that he found the door open which before he had found locked being no evidence of an implied invitation to enter.

In the same case it was *said*, that even if it should be assumed that there was an implied invitation to enter the cellar to deliver the barrel, there was no invitation to go about in the darkened cellar in search of a receiving clerk or to pass through the cellar as a short cut to the store above.

TORT for personal injuries sustained by the plaintiff on November 27, 1915, by falling into a hole or opening in the floor of the cellar of the defendant's place of business at the corner of Main Street and Pleasant Street in Worcester, when the plaintiff had gone there to deliver a barrel of goods. Writ dated December 15, 1915.

In the Superior Court the case was tried before *O'Connell*, J. The evidence is described in the opinion. At the close of the evidence, the judge having refused to order a verdict for the defendant, the defendant asked him to make the following rulings:

"1. Upon all the evidence the plaintiff cannot recover and the verdict must be for the defendant.

"2. Upon all the evidence in the case the plaintiff was a mere licensee upon the premises of the defendant at the time of his injury and the defendant owed him no duty except to refrain from wantonly and wilfully injuring him."

The judge refused to make either of these rulings and submitted

the case to the jury, who returned a verdict for the plaintiff in the sum of $432.32. The defendant alleged exceptions.

The case was submitted on briefs.

C. C. Milton & F. L. Riley, for the defendant.

J. F. McGrath, for the plaintiff.

PIERCE, J. This is an action of tort for damages sustained by reason of a fall into an opening into which a condenser had been placed in the cellar occupied by the United Cigar Stores Company at the corner of Main and Pleasant streets in the city of Worcester. The facts are substantially as follows:

The defendant occupied a store and a cellar beneath the store where the plaintiff was injured. The Bay State Trucking Company under an arrangement with the defendant, on an average once a week, on notice that the defendant had merchandise awaiting delivery, sent its teams to a freight office to get the merchandise and deliver it in the rear way of the defendant's store. The plaintiff was an employee of the trucking company. In the rear of the store there was a street passageway from which a door opened upon a water elevator operated by a rope; there was a bell on the left hand side of the elevator doorway. The elevator descended about twelve to fifteen feet from the level of the passageway to the basement floor of the cellar. In the basement were two sheathing partitions; one set off from the elevator the cellar of the defendant; the other partitioned off the cellar of another tenant. Three or four feet from the elevator an ordinary panel door opened into the cellar of the defendant; this door ordinarily was kept locked by a bar on the inside. All merchandise received at the rear of the store was kept in the cellar. Where goods to be delivered were of some size, the customary way of delivery was to drive the team to the elevator in the passageway, ring the bell by the side of the elevator door, and then, if the bell did not attract anybody's attention or was out of order, to go round to the outside, "up front," and ask for the shipping clerk.

The defendant's manager, called as a witness by the plaintiff, testified as follows: "It was customary for people delivering goods to come up to the store to notify us that they had goods to deliver; they invariably did that. Until we were notified upstairs nobody had a right in the cellar at all. Sometimes goods were

delivered in small parcels upstairs. Larger parcels were delivered downstairs, but not until after notice was given to those in charge upstairs that there was something to be delivered downstairs, and after they were told where to deliver the parcels downstairs, and after there was some one to go with them while delivering the parcels."

On the day of the accident the plaintiff got a barrel from the freight depot and drove in the back alley; the elevator was not up when he got there. He testified: "I called out because I could not get it under way. The rope was on the inside, a ways from the door. I got the rope. The elevator well might have been ten feet deep. The elevator came up; before the elevator came up I hollered and then I went and got my barrel off the team; it was a light barrel — I did not back up. There was no response when I hollered but the elevator came up; I put the barrel on the elevator and took it down and went into the cellar; the door was open; . . . it was not open on my previous visits. On the previous visits after going down in the elevator I rapped on the door and hollered and some one came and opened the door, but on the day of the accident the door was open. I walked in with my barrel and rolled it in and hollered three or four times as loud as I could and nobody answered. . . . After I left the barrel near the door I took two or three steps ahead and hollered out in a loud voice and then stood still. I hollered out to have somebody come and let them know I was there. Nobody replied; I stood still and hollered three or four times, then I took a couple of steps more and stood up and hollered again. I hollered three or four times and nobody answered and then I took one step more. I don't know whether it was forward or sideways; then I fell into the hole" which was six feet deep, with a brick foundation, constructed by an electric company to hold a condenser. The plaintiff further testified: "It was dark enough so that when I took this step forward I felt I ought to go slowly, and I did go slowly, taking care that the place was not just as it ought to be and I knew the place and I thought just where I was going because I had been in there before and I thought that I could work my way. I could not see much of anything, but I could distinguish anything. I could have gone back again to the elevator and gone round and told the people in charge of the store that I was there."

At the close of the evidence the defendant made a motion "that upon all the evidence the court direct a verdict for the defendant." The presiding judge refused to grant the motion and the defendant excepted.

We are of opinion that the motion should have been granted. There is no evidence of an express invitation to the plaintiff to enter the cellar of the defendant; and the fact that the plaintiff found the cellar door open on this visit to the cellar affords no basis of proof of an implied invitation to enter, when the fact of the open door is considered in connection with the fact that the door was locked at the previous times when the plaintiff had delivered merchandise there, and with the further undisputed fact that it was customary for truckmen to notify those in charge of the store of their presence with merchandise ready for delivery in the cellar of the defendant, the door of which ordinarily was kept locked.

Moreover, should it be assumed that there was an implied invitation to enter the cellar to deliver the barrel, it is plain that there was none to afterwards go about in the darkened cellar in search of a receiving clerk, or to pass through the cellar in a short cut to the store above. *Cowen* v. *Kirby*, 180 Mass. 504. *Morong* v. *Spofford*, 218 Mass. 50. *Graham* v. *Pocasset Manuf. Co.* 220 Mass. 195.

Exceptions sustained.

Judgment for the defendant under St. 1909, c. 236

BOSTON TOW BOAT COMPANY *vs.* MEDFORD NATIONAL BANK & another.

Suffolk. October 19, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Corporation, Dissolution. *Equity Pleading and Practice*, Amendment, Decree.

A corporation dissolved by St. 1913, c. 277, was by a provision in § 1 of that statute made subject to St. 1903, c. 437, § 52, which provides that a corporation, after dissolution, shall "be continued as a body corporate for three years after the time when it would have been so dissolved, for the purpose of prosecuting and defending suits by and against it." The three years after dissolution expired on March 12, 1916. In a suit in equity brought during those three years and

pending at their expiration, it was *held* that the bill, unless amended, must be dismissed, because no decree could be entered either for or against the non-existent corporation.

In the suit described above the plaintiff asked leave to show that the claim sued upon had been assigned by the plaintiff before its dissolution by St. 1913, c. 277, and therefore asked to amend the bill to bring the suit in the name of the assignee under the provision of § 3 of that statute, but the essential facts in regard to the alleged assignment were not admitted, and it was *ordered*, that the reservation for this court be discharged, and that, unless further proceedings to amend the bill should be presented before a single justice before a day named, a decree should be entered dismissing the bill, regardless of the merits, because of the non-existence of the plaintiff.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 7, 1915, by the Boston Tow Boat Company, alleged to be a corporation established under the laws of this Commonwealth and having a usual place of business in Boston, against the Medford National Bank and the Medford Trust Company, corporations, praying that both defendants be ordered to pay to the plaintiff the sum of $6,000 with interest and the amount of necessary expenses by reason of certain transactions described in the bill.

The case came on to be heard before *Crosby*, J., who made certain findings of fact, and, being of opinion that the case presented no disputed issue of fact, reserved it upon the pleadings and the evidence, the whole of which was reported, for determination by the full court.

St. 1913, c. 277, is as follows:

"Section 1. Such of the following named corporations as are not already legally dissolved are hereby dissolved, subject to the provisions of sections fifty-two and fifty-three of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three:

[Here follow the names of many corporations, including that of the Boston Tow Boat Company.]

"Section 2. Nothing in this act shall be construed to affect any suit now pending by or against any corporation mentioned in the first section hereof, nor of any suit now pending or hereafter brought for any liability now existing against the stockholders or officers of any such corporation, nor to revive any charter previously annulled or corporation previously dissolved, nor to make valid any defective organization of any of the supposed corporations mentioned in said first section.

"Section 3. Suits upon choses in actions arising out of contracts sold or assigned by any corporation dissolved by this act may be brought or prosecuted in the name of the purchaser or assignee. The fact of sale or assignment and of purchase by the plaintiff shall be set forth in the writ or other process; and the defendant may avail himself of any matter of defence of which he might have availed himself in a suit upon the claim by such corporation, had it not been dissolved by this act.

"Section 4. This act shall take effect upon its passage.

"Approved March 12, 1913."

T. Hunt, for the plaintiff.

J. E. McConnell, for the defendants.

RUGG, C. J. This is a suit in equity brought on April 7, 1915, to recover an obligation claimed to be due from the defendants to the plaintiff. The Boston Tow Boat Company, named as plaintiff, was a Massachusetts corporation. It was dissolved by St. 1913, c. 277. Section 2 of that statute provides for the continuance of certain suits to which the corporation was a party, but does not include the class to which the present suit belongs. It is provided by St. 1903, c. 437, § 52, subject to the terms of which the Boston Tow Boat Company was dissolved, that it shall "be continued as a body corporate for three years after the time when it would be so dissolved, for the purpose of prosecuting and defending suits by or against it." The statute dissolving the corporation took effect on March 12, 1913. The existence of the corporation for purposes of prosecuting or defending litigation under the last cited section therefore came to an end on March 12, 1916, being three years from the date of the dissolution of the corporation for general purposes. The corporation having thus ceased to exist even for purposes of litigation, no decree can be entered in favor of or against it. *Thornton* v. *Marginal Freight Railway*, 123 Mass. 32. *National Bank* v. *Colby*, 21 Wall. 609, 615. *Maine Shore Line Railroad* v. *Maine Central Railroad*, 92 Maine, 476. *Bank of Mississippi* v. *Wrenn*, 3 Sm. & M. 791.

The counsel who brought the suit for the plaintiff have requested leave to show that the claim here in suit was assigned by the Boston Tow Boat Company to persons now in being before its dissolution, and to take such action by way of amendment, substitution of another plaintiff, petition for a receiver, or otherwise,

as may be necessary to effect substantial justice. But in behalf of the defendant it has been stated at the bar that the essential facts warranting such amendments or consideration thereon, if allowed, are not admitted. Manifestly a hearing involving the ascertainment of disputed facts may be necessary. The appropriate tribunal, before which to settle all controverted facts and to allow such amendments as ought to be allowed in order to accomplish substantial equity, is a single justice of this court in the county where the cause is pending. The record does not now present a case where in the exercise of a discretion disposed toward the speedy and just ending of suits the powers conferred by St. 1913, c. 716, ought to be exercised.

The reservation is discharged. If no petition for amendment of the bill or for further proceeding in the case is presented on or before December 31, 1917, a decree is to be entered dismissing the bill, not on its merits but because of the dissolution of the corporate existence of the plaintiff. Otherwise the case is to stand for further hearing before the single justice.

So ordered.

FRANCES S. H. MASSALETTI *vs.* MARY FITZROY.

Middlesex. December 7, 1916. — October 29, 1917.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Degrees of, Toward one transported gratuitously. *Motor Vehicle*, Duty of owner to one transported gratuitously.

One who is travelling *gratis* in a motor car in company with its owner by such owner's invitation and is injured by reason of the negligence of the chauffeur operating the car, who is acting at the time as the servant of the owner, cannot maintain an action against such owner for his injuries unless he can show gross negligence on the part of the chauffeur. *West* v. *Poor*, 196 Mass. 183, approved.

Discussion by LORING, J., of degrees of negligence.

Ground of decision in *Davis* v. *Central Congregational Society*, 129 Mass. 367, discussed by LORING, J.

The measure of liability of one who undertakes to carry a person *gratis* is the same as that of one who undertakes to keep goods *gratis*. By LORING, J.

The rule stated in *Gill* v. *Middleton*, 105 Mass. 477, 480, that "The law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility," is repudiated and overruled.

Justice requires that to make out liability in case of a gratuitous undertaking the plaintiff must prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. By LORING, J.

TORT for personal injuries sustained on January 19, 1911, when the plaintiff by invitation of the defendant was travelling with the defendant in a motor car owned by the defendant and operated by one Smith, alleged to be a servant of the defendant, on Commonwealth Avenue in Newton, by reason of the alleged negligence of the defendant's servant, who drove the car against a post at the side of the highway, overturning the car and pinning the plaintiff under it. Writ dated February 9, 1912.

In the Superior Court the case was tried before *Dana*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the judge under St. 1913, c. 716, § 2, submitted to the jury three questions, which with the answers of the jury were as follows:

"1. Was the accident caused by the negligence of the chauffeur, Smith?" The jury answered, "Yes."

"2. Was Smith the servant of the defendant and acting as such within the scope of his authority at the time of the accident?" The jury answered, "Yes."

"3. What are the damages to which the plaintiff is entitled?" The jury answered, "$1,225."

Thereupon the judge ordered a verdict for the defendant and reported the case for determination by this court, with the stipulation that, if the ordering of the verdict for the defendant was right, final judgment for the defendant was to be entered upon this verdict. If it was wrong, such disposition, including final judgment for the plaintiff for $1,225, was to be made of the case as justice might require.

The report stated that at the trial the plaintiff did not contend that the jury could find from the evidence gross negligence on the part of the defendant.

E. C. Stone, for the plaintiff.

J. M. Hoy, (*C. M. Gordon* with him,) for the defendant.

LORING, J. While staying with the defendant as her guest the plaintiff at the defendant's invitation went out with the

defendant in her motor car. The car was driven by a chauffeur furnished by the owner of the garage where it was kept. Through the negligence of the chauffeur the machine was overturned and fell on the plaintiff, causing the injuries here complained of. The jury found that while driving the machine the chauffeur acted as the defendant's servant, and this finding was warranted by the evidence. They also found that the accident was caused by the negligence of the chauffeur. Upon the jury making these findings the judge directed the jury to return a verdict for the defendant and reported the case to this court.

"At the trial the plaintiff did not claim that the jury could find from the evidence gross negligence on the part of the defendant." There was no question of negligence on the part of any one but the defendant's chauffeur and the plaintiff has not contended that there was. We therefore construe her concession to be a concession that she did not make out a case of gross negligence on the part of the chauffeur.

It was decided in *West* v. *Poor*, 196 Mass. 183, that a defendant who invites a plaintiff to ride *gratis* in his carriage is liable to the same extent that a gratuitous bailee is liable. In *West* v. *Poor* a milkman on returning to his wagon after delivering some milk found in it the plaintiff and some other children. He did not order them out of the wagon but drove on. When the defendant stopped to make the next delivery the plaintiff with the defendant's assistance undertook to get out of the wagon, and while she was in the act of getting out the horse started, the plaintiff was thrown to the ground and suffered the injuries complained of in that action. That case was disposed of by this court in these words: "He [the defendant] did nothing and said nothing to invite them, and the nearest analogy that occurs to us is that of a self invited guest in whose presence the host acquiesces and whose enjoyment he seeks to promote, or that of a gratuitous bailee. In the former case the degree of care required is that of licensor and licensee, (*Plummer* v. *Dill*, 156 Mass. 426, *Hart* v. *Cole*, 156 Mass. 475,) which, as has often been said, requires only that the licensor shall not set traps for the licensee and shall refrain from reckless, wilful or wanton misconduct tending to injure him. *Massell* v. *Boston Elevated Railway*, 191 Mass. 491. In the latter case, in order to render the bailee liable, it must appear that he has been guilty

of culpable negligence. *Whitney* v. *Lee*, 8 Met. 91. *Nolton* v. *Western Railroad*, 15 N. Y. 444." The liability "of a gratuitous bailee" was described by Chief Justice Shaw in the case of *Whitney* v. *Lee*, cited above in these words: "Subject to these remarks upon the application of these distinctions [as to different degrees of negligence], we think it well settled, that a bailee for safe keeping, without reward, is not responsible for the article deposited, without proof that the loss was occasioned by bad faith, or gross negligence. This rule was settled, on great consideration, and after full deliberation, in *Foster* v. *Essex Bank*, 17 Mass. 479; and this supersedes the necessity of any full review of the authorities."

The plaintiff in effect asks us to overrule *West* v. *Poor* so far as the second ground goes on which that case was decided. In that connection she has relied upon *Patnode* v. *Foote*, 153 App. Div. (N. Y.) 494, *Pigeon* v. *Lane*, 80 Conn. 237, and *Beard* v. *Klusmeier*, 158 Ky. 153. In addition to these cases relied upon by the plaintiff, there are cases to the same effect not cited by her which ought to be considered in connection with them. We take them up in their order. The first of these cases in point of time is *Mayberry* v. *Sivey*, 18 Kans. 291. That case was decided on the authority of this statement of Wharton in his text-book on negligence: "A person who undertakes to do service for another is liable to such other person for want of due care and attention in the performance of the service, even though there is no consideration for such undertaking. The confidence accepted is an adequate consideration to support the duty." But Mr. Wharton is of opinion that in the common law of England there are no degrees of negligence. This conclusion is based on Mr. Wharton's contention that the opinion of Chief Justice Holt in *Coggs* v. *Bernard*, 2 Ld. Raym. 909, so far as it made a distinction between gross and ordinary negligence was based on a misapprehension as to the rule of the civil law. See Whart. on Negl. (2d ed.) §§ 482–510. Whether different degrees of negligence are known to the common law is a question to be considered by itself and taken up later on. The next case in point of time and the most important of all these cases is *Pigeon* v. *Lane*, 80 Conn. 237. In that case the defendants had sent a sleigh in charge of their servant, Rinski by name, to bring their employees to their work and there was evidence that the plaintiff was injured by Rinski's negligence. The pre-

siding judge instructed the jury that it was immaterial whether the defendants were bound to send the sleigh to bring the plaintiff to his work or had sent the sleigh gratuitously; that in either case Rinski was the fellow servant of the plaintiff and the defendants were not liable. The Supreme Court of Errors of Connecticut decided that if the defendants sent Rinski gratuitously he was not the plaintiff's fellow servant and for that reason the appeal was well taken. After that point had been decided this was added (at page 241): "Although, if the plaintiff was injured while riding upon the sleigh as a mere licensee, the defendants could be held liable only for their active negligence in causing the injury — which would include their own or their servant Rinski's negligent acts by which the danger of riding upon the conveyance was increased, or a new danger created, while the plaintiff was riding under such license (*Pomponio* v. *New York, New Haven, & Hartford Railroad,* 66 Conn. 528, 538), — the allegation that the injury was caused by the careless, negligent and improper driving of the conveyance by the defendants' servant, in such a manner that it collided with the bridge, is a sufficient averment to permit proof of that negligence which would render the defendants liable as licensors." *Pomponio* v. *New York, New Haven, & Hartford Railroad,* 66 Conn. 528 (on the authority of which this statement in *Pigeon* v. *Lane* is founded) was a case where on the findings made the plaintiff was crossing the defendant's track for his own convenience at a place planked as a crossing but where neither the plaintiff nor the public had a right to cross, and was injured by the negligence of the defendant in the operation of one of its trains. It was held that while the plaintiff, being on the defendant's premises for his own convenience, was a licensee and therefore took the defendant's premises as he found them (in the absence of a trap), the defendant was liable for injuries suffered by the plaintiff by reason of active negligence in the operation of its trains. *Pomponio* v. *New York, New Haven, & Hartford Railroad* was decided on the authority of *Corrigan* v. *Union Sugar Refinery,* 98 Mass. 577. That was a case in which the plaintiff was proceeding as a licensee along an alleyway on the premises of the defendant and was injured by the negligence of the defendant's servants in throwing down beer barrels into the alleyway. In *Pomponio* v. *New York, New Haven, & Hartford Railroad, ubi*

supra, the court quotes a reference of this court in *Stevens* v. *Nichols*, 155 Mass. 472, 475, to the doctrine of *Corrigan* v. *Union Sugar Refinery*, which was in these words: "The licensor has, however, no right to create a new danger while the license continues. *Oliver* v. *Worcester*, 102 Mass. 489, 502. *Corrigan* v. *Union Sugar Refinery*, 98 Mass. 577. *Corby* v. *Hill*, 4 C. B. (N. S.) 556. So a railroad company which allows the public habitually to use a private crossing of its tracks cannot use active force against a person or vehicle crossing under a license, express or implied." It is not necessary to consider whether this reference in *Stevens* v. *Nichols* to the doctrine of *Corrigan* v. *Union Sugar Refinery* is or is not a sufficiently careful statement of that doctrine to determine the reason on which it is founded or the limitations to which it is subject. The rule of *Corrigan* v. *Union Sugar Refinery* is a rule as to the liability of a licensor to a licensee. But where a defendant invites a plaintiff to ride *gratis* in his carriage the question is not a question of the measure of liability of a licensor to a licensee. It is the question of the measure of the liability assumed in case of a gratuitous undertaking. For this reason the doctrine of *Pomponio* v. *New York, New Haven, & Hartford Railroad* and of *Corrigan* v. *Union Sugar Refinery* (the case on which *Pomponio* v. *New York, New Haven, & Hartford Railroad* was decided) is not applicable in the case at bar where the defendant invited the plaintiff to ride *gratis* in her carriage.

The next case in point of time is *Patnode* v. *Foote*, 153 App. Div. (N. Y.) 494. In that case it was said that no decision upon the point had been found in New York but that the case of *Pigeon* v. *Lane* in Connecticut "impresses us as stating the true rule." Without further discussion the court followed the opinion in *Pigeon* v. *Lane*. The next case, *Adams* v. *Tozer*, 163 App. Div. (N. Y.) 751, was decided on the authority of *Patnode* v. *Foote* and of *Grimshaw* v. *Lake Shore & Michigan Southern Railway*, 205 N. Y. 371. The latter was a case where the plaintiff, being by license of the Wabash Railroad Company on an engine of that company, was injured in a collision at a grade crossing of the rails of the Wabash and of the defendant railroad company caused by the negligence of those operating the defendant's engine. It was held that the defendant owed the plaintiff the duty of exercising due care not to injure him since he was lawfully on the Wabash

engine and that it was immaterial that he was lawfully there by license and not by compensation paid by him to the Wabash Railroad Company. In other words the point decided in *Grimshaw* v. *Lake Shore & Michigan Southern Railway, ubi supra,* is that decided in *Boutlier* v. *Malden,* 226 Mass. 479. It has no bearing upon the liability of a defendant who invites a plaintiff to ride *gratis* in his carriage. There is another case in New York (referred to in one of the cases to be considered later on) namely, *Birch* v. *New York,* 190 N. Y. 397. The point decided in that case was that a licensee entering on the wharf of a licensor takes the property as he finds it. In making that decision the court said *obiter* that the owner of land is liable to one entering upon it as licensee for active negligence on its part; that is to say, it was liable in a case like *Corrigan* v. *Union Sugar Refinery.* The next case in point of time is *Lochhead* v. *Jensen,* 42 Utah, 99. In that case a verdict was set aside on the ground that the plaintiff was allowed at the trial to recover for an injury not alleged in the complaint. After setting aside the verdict on that ground the court (at page 104) said with respect to a new trial: that there was nothing in the defendant's contention "that 'the ride in the automobile was the mutual enjoyment of all three' occupants, and since the plaintiff did not show that the deceased protested against the manner of its operation it must be presumed that he acquiesced therein; and therefore the negligence, if any, of the defendant must be imputed to the deceased." There was nothing else in the case which bears or might be thought to bear upon the question which we have under consideration. The next case in point of time is *Beard* v. *Klusmeier,* 158 Ky. 153. That case was decided without discussion on the authority of *Lochhead* v. *Jensen* and *Patnode* v. *Foote.* The next is *Fitzjarrell* v. *Boyd,* 123 Md. 497. That case was decided on the authority of Huddy on Automobiles, § 113; *Patnode* v. *Foote, Beard* v. *Klusmeier, Pigeon* v. *Lane, Birch* v. *New York, Mayberry* v. *Sivey* and *Lochhead* v. *Jensen.* After citing these authorities the court said at page 506: "The rule announced in these cases, we think, is the true and correct rule, and is controlling on this appeal." There was no further discussion of the principles involved or of other decisions.

It is apparent from this review of the decisions in conflict with *West* v. *Poor* that the question whether they are or are not correct

depends upon the question whether degrees of negligence are known to the common law and whether the rule of *Corrigan* v. *Union Sugar Refinery* governs the liability of a defendant who invites a plaintiff to ride *gratis* in his carriage. Apart from the question whether degrees in negligence are a thing known to the common law (which was in reality what was decided in the negative in *Mayberry* v. *Sivey*, 18 Kans. 291) we are of opinion that these cases are not well decided and that they should not be followed.

Mr. Wharton is not alone in the conclusion reached by him that no such a thing as different degrees in negligence is known to the common law. It was said by Lord Cranworth (then Baron Rolfe) in *Wilson* v. *Brett*, 11 M. & W. 113, 115, 116, that: "I said I could see no difference between negligence and gross negligence — that it was the same thing, with the addition of a vituperative epithet." In *Beal* v. *The South Devon Railway*, 3 H. & C. 337, 341, Crompton, J., in delivering the judgment of the Exchequer Chamber said that it was a mistake to say that there was no difference between ordinary and gross negligence "because a strict line of demarcation cannot be drawn between them." And in *Grill* v. *General Iron Screw Colliery Co.* L. R. 1 C. P. 600, both Willes, J., and Montague Smith, J., expressed their dissatisfaction with the term gross negligence. Willes, J., went so far as to say, at page 612: "No information, however, has been given us as to the meaning to be attached to gross negligence in this case; and I quite agree with the dictum of Lord Cranworth in *Wilson* v. *Brett* that gross negligence is ordinary negligence with a vituperative epithet, — a view held by the Exchequer Chamber: *Beal* v. *South Devon Railway Co.* [3 H. & C. 337]. Confusion has arisen from regarding negligence as a positive instead of a negative word." But it is probable that an end was put in England to these objections to the term gross negligence by the decision of the Privy Council in *Giblin* v. *McMullen*, L. R. 2 P. C. 317, the judgments of which, while not binding on the High Court, are "entitled to very great weight indeed." *Dulieu* v. *White*, [1901] 2 K. B. 669, at page 677. That was a case in its dramatic as well as in its legal aspects like *Foster* v. *Essex Bank*, 17 Mass. 479, and it was largely upon the authority of the decision in *Foster* v. *Essex Bank* that *Giblin* v. *McMullen* was decided. In delivering the judgment

of the Privy Council in *Giblin* v. *McMullen*, Lord Chelmsford said at pages 336, 337: "From the time of Lord Holt's celebrated judgment in *Coggs* v. *Bernard*, in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called 'gross negligence.'" After referring to Lord Cranworth's observation in *Wilson* v. *Brett* and to the fact that "this critical observation has been since approved of by other eminent judges," he said: "Of course, if intended as a definition, the expression 'gross negligence' wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference. . . . No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject, and though degrees of care are not definable, they are with some approach to certainty distinguishable." *Giblin* v. *McMullen*, *ubi supra*, established the rule laid down by Chief Justice Holt in *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 913, that to charge a defendant in case of gratuitous bailment the plaintiff must prove gross negligence, and that rule has been applied in the only cases of gratuitous undertakings which have arisen in England since then. In *Moffatt* v. *Bateman*, L. R. 3 P. C. 115, the question to be decided in the case at bar was before the court. It was held by the Privy Council that, in case of an invitation to ride *gratis* in the defendant's carriage, to make out liability the plaintiff had to prove gross negligence. And in *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145, it was decided that, in the case of a gratuitous lending of an engine for the sole benefit of the borrower, the borrower to make out liability had to prove a gross neglect on the part of the lender. In all three of these cases the decision was that the plaintiff took nothing because he had failed to make out gross negligence.

In *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468, 485,

486, Grier, J., said: "It is true a distinction has been taken, in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference, (if it be capable of definition,) as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" In *Steamboat New World* v. *King*, 16 How. 469, 474, Curtis, J. (after pointing out that the appellee was lawfully upon the steamboat of the plaintiff) said that it was not necessary to decide whether "precisely the same obligations in all respects" attached in that case as in case of an ordinary passenger paying fare. He then referred to the statement of Grier, J., in *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468, which we have just quoted, and he added: "We desire to be understood to reaffirm that doctrine." In addition he said: "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice;" he then refers among other cases to *Wilson* v. *Brett*, 11 M. & W. 113, and adds: "Some of the ablest commentators on the Roman law, and on the civil code of France, have wholly repudiated this theory of three degrees of diligence." See also in this connection *Milwaukee & St. Paul Railway* v. *Arms*, 91 U. S. 489, 493–495; *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, 295, 296; *Northern Pacific Railway* v. *Adams*, 192 U. S. 440. But in the case of *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 382, 383, Bradley, J., said: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very

little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that 'every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it.' Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice."

The last word of importance upon this point to be found in the decisions of the Supreme Court of the United States is in *Preston* v. *Prather*, 137 U. S. 604. In that case the rule in *Foster* v. *Essex Bank*, 17 Mass. 479, was repudiated. In that case Field, J., said (pages 608, 609): "No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. . . . But what will constitute such reasonable care will vary with the nature, value and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. . . . The general doctrine, as stated by text writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases

is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived. See *Steamboat New World* v. *King*, 16 How. 469, 474, 475; *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 383; *Milwaukee & St. Paul Railway* v. *Arms*, 91 U. S. 489, 494."

In this Commonwealth the judges seem to have had little if any difficulty in recognizing degrees of negligence in case of gratuitous bailments but to have had Lord Cranworth's difficulty (or rather the difficulty which those who followed Lord Cranworth put in articulate form) in other cases. The remarks to which we referred but did not set forth when we quoted the opinion of Chief Justice Shaw in *Whitney* v. *Lee*, 8 Met. 91, 93, were these: "The law has endeavored to make a distinction in the degrees of care and diligence to which different bailees are bound; distinguishing between gross negligence, ordinary negligence, and slight negligence; though it is often difficult to mark the line where the one ends and the other begins. And it must be often left to the jury, upon the nature of the subject matter, and the particular circumstances of each case, with suitable remarks by the judge, to say whether the particular case is within the one or the other." In the later case of *Chandler* v. *Worcester Mutual Fire Ins. Co.* 3 Cush. 328, Chief Justice Shaw was more pronounced in his views as to degrees of negligence. That was a case in which the defendant set up in defence to a claim on a fire insurance policy the fact that the fire had taken place through the gross neglect of the insured. After deciding that to make out the defence relied upon the insurance company had to "show a culpable recklessness and indifference to the rights of others," Chief Justice Shaw added at page 331: "The terms 'slight negligence,' 'want of ordinary care,' and 'gross negligence,' are useful in their way, but they are not precise and exact enough, without a statement of the facts designated by them, to enable a court to judge of the rights of the parties thereby affected. The proper business of jurisprudence seems to be, to take a series of facts and circumstances, conceded or proved, and to declare what are the rights of the parties arising out of them." In *Smith* v. *First National Bank*, 99 Mass. 605, (a case of gratuitous bailment,) Wells, J., ends the opinion at page 612

in these words: "But the court are of opinion that the whole testimony did not furnish such evidence as would warrant a jury in finding that there was gross negligence on the part of the bank, and that the loss of the bonds resulted from such negligence. *Giblin* v. *McMullen*, L. R. 2 P. C. 317. The exceptions must therefore be sustained upon that ground." *Gill* v. *Middleton*, 105 Mass. 477, was a case in which the defendant (the owner of the premises in question then leased to the plaintiff's husband) had undertaken to repair them *gratis*. The presiding judge told the jury that the defendant was liable if the premises were "not put in safe repair, by reason of the want of ordinary skill or care in the workmanship or selection of materials on the part of the defendant." The defendant contended in support of an exception taken to this part of the charge "that upon a gratuitous undertaking of this nature the defendant could only be held responsible for bad faith or for gross negligence." His contention was not sustained and his exceptions were overruled. Ames, J., in delivering the opinion of the court said at pages 479, 480: "It appears to us that this is one of the cases in which there is no practical difference between gross negligence and the want of ordinary care and skill; and that the omission of what Baron Rolfe calls a mere vituperative epithet is not a valid objection to the judge's charge. The true question for the jury was, whether the defendant had discharged the duty which he had assumed, with that due regard to the rights of the other party which might reasonably have been expected of him under all the circumstances." After referring to the case of *Steamboat New World* v. *King*, 16 How. 469, he added, "The law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility. The question of reasonable care must always depend on the special circumstances of each case, and is almost of necessity a question of fact rather than of law. The degrees of negligence, so often spoken of in text books, do not admit of such precision and exactness of definition as to be of any practical advantage in the administration of justice, without a detail of the facts which they are intended to designate. *Steamboat New World* v. *King*, 16 How. 469. *Chandler* v. *Worcester Mutual Fire Ins. Co.* 3 Cush. 328. *Wilson* v. *Brett*, 11 M. & W. 113. *Grill* v. *General Iron Screw Colliery Co.* L. R. 1 C. P. 600." The same learned judge in delivering the opinion of this

court in the later case of *Jenkins* v. *Bacon*, 111 Mass. 373 (a case of gratuitous bailment), said at page 376: "According to the well settled rule, the bailee who acts without compensation can only be held responsible for bad faith, or gross negligence, if the deposit should be lost or injured while in his custody. *Whitney* v. *Lee*, 8 Met. 91. *Foster* v. *Essex Bank*, 17 Mass. 479." In *Smith* v. *Postal Telegraph Cable Co.* 174 Mass. 576, at page 578, Holmes, C. J., said: "If the rule is to be adhered to that there can be no recovery for sickness due to the purely internal operation of fright caused by a negligent act, it cannot be avoided by calling the negligence gross and alleging that the defendant ought to have known that the result complained of would follow his act. Negligence with reference to a given consequence means that the consequence ought to have been foreseen, and although the distinction between gross negligence and negligence is known to the law, still, having regard to the grounds for the above-mentioned rule, to allow it to be avoided by such an allegation would be to do away with it."

Apart from the opinions expressed in these common law cases, the question whether in the administration of justice it is possible or practicable to draw a distinction between ordinary and gross negligence has been put to rest in this Commonwealth by decisions under statutes which have made a distinction between the two. It was provided as early as 1840 (St. 1840, c. 80) and has been continued in a number of statutes enacted since then (for a collection of these statutes see *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510; *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8) that various persons and corporations should be liable to a penalty if the death of a person was caused through the gross negligence of their servants.* And by St. 1871, c. 352, now R. L. c. 111, § 268, it was provided that a railroad corporation should be liable for an accident at a grade crossing where the statutory signals have not been given unless "the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence . . . and that such gross or wilful negligence . . . contributed to the injury." Both sets of statutes made a distinction between gross and ordinary negligence. Although judges of this court have had the

* The word "gross" was stricken out of the present statute in the case of railroads and street railways by St. 1907, c. 392.

same difficulty in determining the meaning of gross negligence under these statutes that they had as to the meaning of that term at common law (see Knowlton, J., in *Phelps* v. *New England Railroad*, 172 Mass. 98, 100, and Hammond, J., in *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77, 79), yet it is settled that the term gross negligence in these statutes means a materially greater want of care than in case of ordinary negligence. The distinction between the two has been recognized in numberless cases, but the meaning of gross negligence as distinguished from a want of ordinary care has been defined (in the way stated above) in the following cases under the death statutes: *Galbraith* v. *West End Street Railway*, 165 Mass. 572; *Morey* v. *Gloucester Street Railway*, 171 Mass. 165; *Phelps* v. *New England Railroad*, 172 Mass. 98; *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77; *Brennan* v. *Standard Oil Co. of New York*, 187 Mass. 376; *Dolphin* v. *Worcester Consolidated Street Railway*, 189 Mass. 270; *Spooner* v. *Old Colony Street Railway*, 190 Mass. 132; *Pearlstein* v. *New York, New Haven, & Hartford Railroad*, 192 Mass. 20; *Manning* v. *Conway*, 192 Mass. 122; *Lanci* v. *Boston Elevated Railway*, 197 Mass. 32; *Dimauro* v. *Linwood Street Railway*, 200 Mass. 147; *Devine* v. *New York, New Haven, & Hartford Railroad*, 205 Mass. 416; *Renaud* v. *New York, New Haven, & Hartford Railroad*, 206 Mass. 557; *Adams* v. *Boston Elevated Railway*, 214 Mass. 1. And it has been defined in the same way in three cases arising under the statutes as to the failure to give signals at grade crossings in R. L. c. 111, § 268; *Copley* v. *New Haven & Northampton Co.* 136 Mass. 6; *Debbins* v. *Old Colony Railroad*, 154 Mass. 402; *Emery* v. *Boston & Maine Railroad*, 173 Mass. 136. In further explanation of the meaning of gross negligence under these statutes it is settled that it is something less than the wilful, wanton and reckless conduct which makes a defendant liable to a trespasser. *Banks* v. *Braman*, 188 Mass. 367. Note to *Fitzmaurice* v. *New York, New Haven, & Hartford Railroad*, 192 Mass. 159, 162. *Lanci* v. *Boston Elevated Railway*, 197 Mass. 32.

Whether Mr. Wharton and the commentators referred to by Mr. Justice Curtis in *Steamboat New World* v. *King*, *ubi supra*, are right or wrong as to the existence of degrees of negligence in the civil law, it is plain that in this Commonwealth that distinction exists. And it is not necessary in deciding that question

to go outside of the law which is administered here. The distinction was first put forward in England in 1703 in *Coggs* v. *Bernard*, 2 Ld. Raym. 909. It was adopted in this Commonwealth in *Foster* v. *Essex Bank*, 17 Mass. 479, in 1821, and the rule adopted in that case was (in the words of Chief Justice Shaw in *Whitney* v. *Lee*, 8 Met. 91) "settled, on great consideration, and after full deliberation . . . and this supersedes the necessity of any full review of the authorities." The decision in *Foster* v. *Essex Bank* (involving the distinction between gross and ordinary negligence) was affirmed by this court in *Whitney* v. *Lee*, *supra*; *Smith* v. *First National Bank*, 99 Mass. 605, and *Jenkins* v. *Bacon*, 111 Mass. 373. And (in spite of *Preston* v. *Prather*, 137 U. S. 604) that is the rule adopted generally in other jurisdictions. *Giblin* v. *McMullen*, L. R. 2 P. C. 317. *Hibernia Building Association* v. *McGrath*, 154 Penn. St. 296. *Storer* v. *Gowan*, 18 Maine, 174. *Michigan Central Railroad* v. *Carrow*, 73 Ill. 348. *Illinois Central Railroad* v. *Tronstine & Co.* 64 Miss. 834. The doubt as to the existence of the distinction raised by the opinion of Ames, J., in *Gill* v. *Middleton*, 105 Mass. 477, must be taken (even without regard to the subsequent opinion of the same learned judge in *Jenkins* v. *Bacon*) to have been a doubt which on a review of all the common law authorities no longer exists in this Commonwealth. In addition that doubt has been put at rest so far as this Commonwealth is concerned by the decisions of this court under statutes which made the distinction between gross and ordinary negligence. No one familiar with the jurisprudence of Massachusetts could question to-day the existence in this Commonwealth of the distinction between gross and ordinary negligence.

In spite of the decisions in *Giblin* v. *McMullen*, L. R. 2 P. C. 317, *Moffatt* v. *Bateman*, L. R. 3 P. C. 115, and *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145, a doubt arises as to the measure of liability in England in a case where a person enters upon a gratuitous undertaking. That doubt arises from the terms used by Chief Justice Holt in stating the liability of a bailee in case of the sixth sort of bailment discussed by him in his opinion in *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 913, and those used by Collins, M. R., in delivering the judgment of the Court of Appeal in *Harris* v. *Perry & Co.* [1903] 2 K. B. 219, 226. In delivering judgment in *Coggs* v. *Bernard*, Lord Holt first laid it down (see page 913) that,

in case of a gratuitous bailment of goods for the sole benefit of the bailee, the bailee "is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect." This was the first sort of bailment considered by Chief Justice Holt in *Coggs* v. *Bernard*. When the Chief Justice came to the sixth sort of bailment considered by him in that judgment, namely, an undertaking to transport goods where the bailee was to have no reward for his pains he said (at pages 918, 919): "Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called *mandatum*. . . . It is what we call in English acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. . . . This undertaking obliges the undertaker to a diligent management." *Harris* v. *Perry & Co.*, *ubi supra*, was a case in which an inspector of work being done in the construction of an underground railway at the time of the accident was riding *gratis* for his own convenience at the invitation of one of the defendant's officers on the engine of a construction train in place of using a plank walk constructed by the defendant to enable inspectors to oversee the work. While so riding he was injured by the negligence of the defendant's agents. In delivering the judgment of the Court of Appeal in that case, Collins, M. R., after stating that there was evidence of a trap and so liability even if the plaintiff was a licensee, said: "At all events, I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. . . . There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely received permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation: see in the case of goods, *Southcote's Case*, cited in *Coggs* v. *Bernard*, and the notes thereto." It would appear on the first reading of these two judgments that both the learned judges intended to make a distinction between the care which has to be exercised in case of a gratuitous bailment

and that which has to be exercised in case of a gratuitous undertaking of transportation. But upon a full consideration of the matter it cannot be taken that either of them intended to make that distinction.

Coggs v. *Bernard* was before the court on a motion in arrest of judgment after a verdict for the plaintiff. The motion in arrest of judgment was based on the ground and solely on the ground that it was not alleged in the declaration that the defendant was to be paid for his pains. All that was before the court was the proposition that a defendant could be liable in case of a gratuitous transportation. No question was raised as to the measure of the defendant's liability in a case of a gratuitous transportation if there was liability in such a case. The Chief Justice disposed of the contention that a gratuitous undertaking to transport was a *nudum pactum* by pointing out the distinction between the case where a defendant fails to enter upon a gratuitous undertaking and the case where having entered upon it he is negligent in carrying it out. The fact that in stating that there was liability in a case where the defendant had entered upon a gratuitous undertaking Chief Justice Holt was not careful to state with accuracy the measure of that liability cannot be taken to be decisive. That question was not up for decision at that time.

The same is true of that part of the judgment of Collins, M. R., in *Harris* v. *Perry & Co.* quoted above. The contention in *Harris* v. *Perry & Co.* to which Collins, M. R., was addressing himself was that the plaintiff in that case was a licensee and that since he was a licensee he could not recover at all. In addressing himself to that contention Collins, M. R., said (first) there was evidence of a trap, and (secondly) that apart from that there was evidence on which the jury could find that there was a failure of care on the part of the defendant. To be sure he spoke of a lack of ordinary care in place of gross negligence. When one takes into account the fact that gross negligence is a term with which the English judges have quarrelled continually, it is perhaps natural that Collins, M. R., did not go out of his way to speak of gross negligence and did speak of "ordinary care." Moreover it is to be noticed that what Collins, M. R., said was: "a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously."

But upon the question of the true interpretation of these two judgments there is more to be said. In his note to *Coggs* v. *Bernard*, Mr. Smith has this to say at pages 98, 103, 104, 1 Smith's Lead. Cas. (1st Eng. ed.): "6. *Mandatum*. . . . The sixth and last class of bailments is (according to Lord *Holt*) *mandatum*, or a delivery of goods to somebody who is to carry them, or do something about them, *gratis*. And this might have been classed under the same head with *depositum*. For as the *keeping*, *carrying*, and *working upon* goods *for hire* are all included, both by Lord *Holt* and Sir *W. Jones*, under the same head, there seems no good reason why the *keeping*, *carrying*, and *working upon* them *gratuitously* should not have been so likewise. Certain it is, that the liabilities of the *depositary* and of the *mandatary* are precisely the same; both (in the absence, at least, of a contract in special terms) are bound to *slight diligence*, and to slight diligence only, and liable for nothing short of *gross negligence*, the reason in each case being the same, namely, that neither is to receive any reward for his services. Accordingly, whenever the extent of a mandatary's liability is discussed we find the cases respecting that of depositaries cited, and relied upon, and so *vice versa*. The cases of *Beauchamp* v. *Powley*, 1 M. & Rob. 38, *Shiells* v. *Blackburne*, 1 H. Bl. 158, and *Dartnall* v. *Howard*, 4 B. & C. 345, the facts of which are respectively stated at the commencement of this note, were decisions on the responsibility of mandataries, and from those, as well as from the general principle, it appears that such bailees are liable for *gross negligence*, and for that only." It is to be observed in connection with Mr. Smith's statement ("accordingly, whenever the extent of a mandatary's liability is discussed we find the cases respecting that of depositaries cited and relied upon") that *Harris* v. *Perry & Co.*, a case of a gratuitous *mandatum*, was decided on the authority of *Southcote's Case*, 4 Co. Rep. 83 *b*, a case of a gratuitous *depositum*. And that is true of *West* v. *Poor*, 196 Mass. 183, also; that case (a case of a gratuitous *mandatum*) was decided on the authority of *Whitney* v. *Lee*, 8 Met. 91, which was the case of a gratuitous *depositum*. There is more to be said with respect to the proper interpretation of Lord Holt's judgment in *Coggs* v. *Bernard* concerning a distinction between a gratuitous bailment and an undertaking of gratuitous transportation. That is that the third and fourth editions of Smith's Leading Cases were edited by

Mr. (afterwards Mr. Justice) Keating and by Mr. (afterwards Mr. Justice) Willes and that the seventh, eighth and ninth editions of Smith's Leading Cases were edited (with Mr. Arbuthnot) by Lord (then Mr.) Collins, who, when Master of the Rolls delivered the judgment in *Harris* v. *Perry & Co.* The statement of Mr. Smith quoted above (that there is no distinction between the measure of the liability in case of a gratuitous bailment and that in a case of a gratuitous transportation) has been left untouched by these three learned editors of that learned work. The fact that this statement was left untouched by Lord Collins would seem to be decisive of the question now under consideration so far as Lord Collins's judgment in *Harris* v. *Perry & Co.* is concerned. There were some additions made in these editions to Mr. Smith's statement but these additions did not even modify much less change the statement of Mr. Smith which we have set forth above. These additions may be found at page 104 in the third English edition, page 184 in the fourth English edition, page 247 in the seventh English edition, page 261 in the eighth English edition, and page 397 in the ninth American edition which is a reprint (with additional notes) of the ninth English edition. A ruling at *nisi prius* upon the question now before us was recently made in *Karavias* v. *Gallinocos*, 143 L. T. 237. In that case the jury found that the defendant was not guilty of gross but was guilty of ordinary negligence. Mr. Justice Avory (who made the ruling) stated that the question "in the state of the authorities, [was] a fit question to be taken to the Court of Appeal," but, since judgment was entered for the plaintiff in *Harris* v. *Perry & Co.*, *ubi supra*, on a finding that the defendant in that case was guilty of ordinary negligence, he felt bound to enter judgment for the plaintiff on the findings made in *Karavias* v. *Gallinocos*.

It would seem that in England the liability of a gratuitous bailee and the liability of one who undertakes a gratuitous transportation is the same. And to this one thing more must be added, namely: However much the English judges have quarrelled with the meaning of the words gross negligence, it is the fact that when pushed to a decision the judges of England have invariably held that to make out liability in case of a gratuitous undertaking (no matter what the nature of the gratuitous undertaking was) gross negligence has to be made out. *Giblin* v. *McMullen*, L. R. 2 P. C.

317, *Moffatt* v. *Bateman*, L. R. 3 P. C. 115, and *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145.

In holding that, to charge a defendant with liability in case of a gratuitous undertaking to transport a person, the plaintiff must prove gross negligence because that is the measure of liability in case of the gratuitous undertaking to keep or carry goods, it is not to be understood that gross negligence in the two cases is the same thing. In all cases (no matter whether the case is one of ordinary or of gross negligence) the consequences likely to result is a fact to be taken into consideration in determining what ought to be done by the defendant to fulfil the measure of his liability. For example: It might be held that the omission to do a certain thing in the transportation of goods was not negligence and that by reason of the seriousness of the consequences likely to result the omission to do the same thing in case of the transportation of a person would be negligence; and so in case of gross in place of ordinary negligence. For this general principle see, for example, *Hartford* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 365; *Mullins* v. *New York, New Haven, & Hartford Railroad*, 201 Mass. 38; *Martin* v. *Boston & Northern Street Railway*, 205 Mass. 16.

This brings us to the consideration of *Davis* v. *Central Congregational Society*, 129 Mass. 367, a case upon which the plaintiff has placed great reliance. In that case it was decided that the defendant society was liable to the plaintiff, who had been invited to attend a conference held in the defendant society's church at which the plaintiff was not a delegate, for injuries suffered by the plaintiff through a dangerous condition in the path leading to the church upon the jury finding that the defendant was negligent in the matter. That case has usually been cited when the doctrine that a charity is not liable for torts under the decision in *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, has been set up in defence. It has never been affirmed as a decision upon the duty owed by a defendant who invites a plaintiff to enter upon his (the defendant's) land solely for his (the plaintiff's) purposes unless it can be held to have been affirmed or approved on that point by what was said by Barker, J., in *Chapin* v. *Holyoke Young Men's Christian Association*, 165 Mass. 280, 281. Of the decision in *Davis* v. *Central Congregational Society* it is to be observed that it

was decided at a time when the distinction between a person going on the premises of the defendant for business to be transacted with the defendant and persons going upon those premises for business of their own (*Plummer* v. *Dill*, 156 Mass. 426, and *Hart* v. *Cole*, 156 Mass. 475) had not been established. Were the case to arise to-day it might be contended that since the plaintiff in *Davis* v. *Central Congregational Society* went on the defendant's premises for her own purposes she was in no better position than the plaintiffs in *Plummer* v. *Dill* and *Hart* v. *Cole*. It is hard to see a distinction between the rights of a plaintiff expressly invited to attend a church conference to which she was not a delegate and a plaintiff impliedly invited to attend a funeral or a wake. But however that may be the decision in *Davis* v. *Central Congregational Society* has no bearing on the question now before us. Whether one invited to come on to the defendant's premises for his (the invitee's) purposes alone takes them as he finds them or can hold the defendant for negligence in case the premises are in a dangerous condition, is a question of the obligation assumed by one inviting another to come upon his land; while the extent of the obligation assumed by inviting one to travel *gratis* in the invitor's carriage is a question of the liability of one who enters upon a gratuitous undertaking whether it be a gratuitous undertaking to keep, carry or lend.

As matter of authority *West* v. *Poor*, 196 Mass. 183, ought not to be overruled. It must be taken to be established in this Commonwealth that to charge a gratuitous bailee the plaintiff must make out gross negligence on his part. *Foster* v. *Essex Bank*, 17 Mass. 479. *Whitney* v. *Lee*, 8 Met. 91. *Smith* v. *First National Bank in Westfield*, 99 Mass. 605. *Jenkins* v. *Bacon*, 111 Mass. 373. The measure of liability of one who undertakes to carry *gratis* is the same as that of one who undertakes to keep *gratis*. To this is to be added the fact that in every case in England in which the question of the measure of liability of a person who enters upon any gratuitous undertaking has arisen the same conclusion has been reached. *Giblin* v. *McMullen*, L. R. 2 P. C. 317. *Moffatt* v. *Bateman*, L. R. 3 P. C. 115. *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145. From an examination of the cases, apart from *Gill* v. *Middleton*, in which a contrary conclusion has been reached, it is apparent that they depend upon the decision in *Corrigan* v. *Union Sugar Refin-*

ery, 98 Mass. 577, or upon the proposition that degrees in negligence are not known to the common law. We are of opinion in the first place (for reasons already stated) that the principle of *Corrigan* v. *Union Sugar Refinery* does not bear upon the measure of liability of one who invites another to travel *gratis* in his carriage; and in the second place that in this Commonwealth at any rate degrees of negligence are known to the law. *Gill* v. *Middleton* was decided on the authority of cases in England and in the Supreme Court of the United States since repudiated in *Giblin* v. *McMullen*, L. R. 2 P. C. 317, and in *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 382, 383. In *Gill* v. *Middleton* the proposition was stated that "The law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility." That proposition is not law in this Commonwealth to-day. In addition the decision in *Gill* v. *Middleton* is in conflict with that in *Foster* v. *Essex Bank*, 17 Mass. 479, and the subsequent cases affirming that decision and with *West* v. *Poor*. We are of opinion that *Gill* v. *Middleton* and the cases following it* are not law in this respect and that they should be overruled in so far as they conflict with those cases. A word of explanation should be added with respect to what was said of *Gill* v. *Middleton* in the case of *Thomas* v. *Lane*, 221 Mass. 447. *Gill* v. *Middleton* involved (*inter alia*) these two propositions, namely: (First) that a defendant who undertakes to do an act *gratis* for the benefit of the plaintiff is liable if guilty of the requisite negligence and (second) that since "the law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility" the defendant is liable in such a case if the plaintiff proves that he was guilty of ordinary negligence. In *Thomas* v. *Lane*, 221 Mass. 447, an attack was made upon the first of these two propositions. It was held that that attack had to fail. There was no occasion at that time to consider or rather to reconsider the second of these two propositions and that proposition was not then passed upon. So far as the first of these

* The rule of *Gill* v. *Middleton* was applied in *Riley* v. *Lissner*, 160 Mass. 330, *Buldra* v. *Henin*, 212 Mass. 275, *McLeod* v. *Rawson*, 215 Mass. 257, and it was referred to as law in *Dix* v. *Old Colony Street Railway*, 202 Mass. 518, 523, and in *Stewart* v. *Cushing*, 204 Mass. 154, 157.

two propositions is concerned *Gill* v. *Middleton* is law, as was stated in *Thomas* v. *Lane*, 221 Mass. 447, 449, but so far as the second proposition is concerned that case is now overruled.

Approaching the question apart from authority we are led to the same conclusion. Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that to make out liability in case of a gratuitous undertaking the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. It is a distinction which seventy-five years' practice in this Commonwealth has shown is not too indefinite a one to be drawn by the judge and acted upon by the jury.

We are of opinion that the decision in *West* v. *Poor* should be affirmed and followed in the case at bar.

In the view which we have taken it has not been necessary to consider the doctrine of *Southcote* v. *Stanley*, 1 H. & N. 247, as to which see *Plummer* v. *Dill*, 156 Mass. 426, 427; *Hart* v. *Cole*, 156 Mass. 475, 477.

The plaintiff has sought to bring this case within *Loftus* v. *Pelletier*, 223 Mass. 63, by suggesting that the jury could have found that the defendant gave the invitation to get the plaintiff's society at the time in question. In *Loftus* v. *Pelletier* the plaintiff had a right to be transported by reason of the fact that she had paid for such transportation by her services as a nurse. The transportation in the case at bar was gratuitous.

The entry must be

Judgment on the verdict.

FRANCIS C. WELCH & others, trustees, *vs.* ELIZABETH M. COLT, executrix, & others.

Suffolk. October 19, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCEY, PIERCE, & CARROLL, JJ.

Devise and Legacy. Words, "Issue."

Estates given by a will are regarded as vesting immediately unless the testator by clear words has manifested an intention that the vesting shall be contingent upon a future event.

A testator, having provided for the division of the residue of his estate into five equal parts, one for each of his four living children and one for the children of a deceased child, provided as follows: "And upon the decease of either of my said children, the proportion of said balance of income herein made payable to them respectively, during their respective lives, is thereafter to be used and appropriated by said trustee for the use & benefit of their respective children, . . . and each of my grandchildren, on arriving at the age of twenty-one years is to receive his or her share or proportion of said rest, residue & remainder of my estate. . . . In the event of the decease of either of my children without leaving lawful issue, then I give, devise and bequeath the share of said rest, residue & remainder to which the issue of such deceased child would have been entitled, had such child died leaving issue, to his or her heirs at law." The only child of one of the daughters of the testator died testate before her mother, having arrived at the age of twenty-one years and leaving issue. *Held,* that the interest in remainder of this grandchild of the testator vested immediately upon the testator's death and was not contingent upon such grandchild surviving her mother, and therefore was disposed of by such grandchild's will.

In the same will, the provision made for another of the testator's daughters gave the trustee the power to sell the real estate occupied by her as a home, of which she was given the use during her life, and provided that such power should be exercised only with the consent in writing of that daughter of the testator without requiring the consent of such of her children as should have reached the age of twenty-one years. *Held,* that this provision did not show that the testator did not regard the children of that daughter as having a vested interest in such real estate during the life of their mother.

In the same case it was *held* that, in the expression "In the event of the decease of either of my children without leaving lawful issue," the testator used the word "issue" in its ordinary sense of all lineal descendants and not as meaning children.

The word "issue" in a will is to be construed in its common acceptation to include all lineal descendants unless the circumstances indicate a clear intention of the testator to give the word a meaning other than its common one.

BILL IN EQUITY, filed in the Probate Court for the county of Suffolk, by the trustees under the will of Stephen Westcott, late of Boston, who died on June 13, 1874, for instructions as to the distribution of the residue of his estate.

The Probate Court made a decree that the heirs at law of Emma W. Bullock, namely, Edith Russell Chesebrough and Westcote Herreshoff Chesebrough, were entitled to the personal property in the hands of the plaintiffs as trustees under the will of Stephen Westcott, the income of which was paid to Emma W. Bullock during her life. Elizabeth M. Colt, executrix of the will of Emma Russell Chesebrough and the Rhode Island Hospital Trust Company, the trustee under that will, appealed from the decree.

The case came on to be heard upon the pleadings and an agreed statement of facts before *Crosby*, J., who reserved it for determination by the full court.

W. R. Tillinghast (of Rhode Island) & *B. Corneau*, for the defendants Elizabeth M. Colt, executrix, and the Rhode Island Hospital Trust Company.

A. F. Flint, for the defendants Edith R. Chesebrough and Westcote H. Chesebrough.

F. C. Welch, for the plaintiffs, submitted a brief.

RUGG, C. J. This is a bill by the trustees under the will of Stephen Westcott, who died in 1874, for instructions as to the distribution of a part of his estate.

That will gave the residue of the estate to trustees. The income was divided into five equal parts (with certain deductions and annuities not now material), the income of four such parts was given to each of four children of the testator during their respective lives, and that of the other fifth part to the children of a deceased daughter. This bill concerns the share of a daughter, as to which the decisive words of the will are, "One fifth part of such balance [of income of the residue] to be paid, quarter-yearly to my daughter Emma, wife of J. Russell Bullock, during her life . . . it being my will that all my children are to share equally (making allowance for the indebtedness of my respective children or sons in law, as hereinbefore explained) in the income and interest of said rest, residue and remainder of my estate, and that their children, at their majority, shall also share equally, *per stirpes*, in said rest, residue & remainder, allowing for such indebtedness. And upon the decease of either of my children, the proportion of said balance of income herein made payable to them respectively, during their respective lives, is thereafter to be used and appropriated by said trustee for the use & benefit of their respective children, during

their minority, who are to take, collectively, the same share of such balance, as their parent, my child, is entitled to receive under this will: and each of my grandchildren, on arriving at the age of twenty one years is to receive his or her share or proportion of said rest, residue & remainder of my estate, made up as above provided: such share or proportion to be ascertained and determined as above provided, and all my grandchildren to take *per stirpes* and not *per capita*.

"In the event of the decease of either of my children without leaving lawful issue, then I give, devise and bequeath the share of said rest, residue & remainder to which the issue of such deceased child would have been entitled, had such child died leaving issue, to his or her heirs at law."

The pertinent facts with reference to which these testamentary words must be interpreted are that the testator's daughter, Mrs. Emma Bullock, died in 1916. Her only child, Emma Russell Chesebrough, born in 1869, died testate in 1908, having arrived at the age of twenty-one years, and leaving two minor children, who are still living.

The question is whether, under the will of her grandfather, Mrs. Chesebrough took a vested remainder, or whether her interest was contingent upon her surviving her mother, and was divested by her decease before her mother. If it was a vested remainder, it passed under her will; if it was contingent or divested, it passed to other persons.

It was said by Mr. Chief Justice Knowlton, in *Bosworth* v. *Stockbridge*, 189 Mass. 266, 267, "The general rule is familiar, that in cases of doubt in the construction of wills the law favors the creation of vested rather than contingent estates. Speaking more specifically, in the language of Mr. Justice Gray in *McArthur* v. *Scott*, 113 U. S. 340, 378, 'it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event.' This is the law of Massachusetts, controlling the later as well as the earlier decisions. *Abbott* v. *Bradstreet*, 3 Allen, 587. *Merriam* v. *Simonds*, 121 Mass. 198. *Minot* v. *Tappan*, 122 Mass. 535. *Hills* v. *Simonds*, 125 Mass. 536. *Teele* v. *Hathaway*, 129 Mass.

164, 165. *Loring* v. *Carnes*, 148 Mass. 223. *Shaw* v. *Eckley*, 169 Mass. 119. *Pierce* v. *Knight*, 182 Mass. 72. *Smith* v. *Smith*, 186 Mass. 138." To the same effect are *Whitman* v. *Huefner*, 221 Mass. 265, 267, *Blume* v. *Kimball*, 222 Mass. 412, *Linscott* v. *Trowbridge*, 224 Mass. 108, *Porter* v. *Porter*, 226 Mass. 204. The principle is firmly established. It is, however, a rule of interpretation and hence must yield where there is disclosed a clear testamentary design that the estate should not vest until the death of the life tenant.

The basic purpose of this will is an equal division of the estate among the five branches of the testator's family, his four living children and his grandchildren, the issue of a deceased child. This purpose is carried out by giving income to his children during life, income to children of his deceased children until they reach the age of twenty-one years, and principal to such grandchildren when they reach that age. This purpose ordinarily can be accomplished more directly and with less probability of complications by the vesting of the several interests in the grandchildren *per stirpes* rather than by holding the matter in uncertainty until the termination of the life estate. The words "upon the decease of either of my children" as preface to the direction of distribution, do not express a contingency, but refer to an inevitable future event. They do not fix the time when the remaindermen are to be ascertained, or when their titles spring into existence, but only when the possession and enjoyment of the shares is to begin. They do not postpone the instant when the gift shall take effect, but refer only to the time of payment. *Pike* v. *Stephenson*, 99 Mass. 188, 190. *Lombard* v. *Willis*, 147 Mass. 13. *Ball* v. *Holland*, 189 Mass. 369. *Boston Safe Deposit & Trust Co.* v. *Nevin*, 212 Mass. 232, 237.

The provisions of the will having particular reference to those grandchildren of the testator who were children of a deceased daughter, relate to circumstances differing from those of his other children and hence have only a remote bearing upon the construction of other parts of the will. But it is plain that the interest of each of these grandchildren vested beyond possibility of divestment upon reaching the age of twenty-one years.

The argument sought to be deduced from the ninth section of the will appears to be of no weight. That argument is that, since in that clause the trustee is given power to sell real estate occupied

as a home by the testator's daughter Harriet, and of which she is given the life use, with her written consent, and that the consent of her children who have reached the age of twenty-one years is required only in the event of her death, this shows that the testator did not regard such children as having a vested interest during the life of their mother even though they were over twenty-one years old. But it is manifest that decisive reasons might induce such a provision quite apart from any thought that the interest of the children of Harriet was contingent upon their surviving their mother.

The word "issue" ordinarily means all lineal descendants. *Jackson* v. *Jackson*, 153 Mass. 374, 377. *Hills* v. *Barnard*, 152 Mass. 67, 73. *Matter of Farmers' Loan & Trust Co.* 213 N. Y. 168, 172. It is not usually equivalent to children, but is more comprehensive. *Holland* v. *Adams*, 3 Gray, 188, 193. *Dexter* v. *Inches*, 147 Mass. 324. *Hall* v. *Hall*, 140 Mass. 267. This will does not show that the testator used the word "issue" as being synonymous with children or as having any other than its common meaning. In all the cases where it has been held that in the particular context "issue" had the same significance as children, expressions have occurred elsewhere in the will indicative of an intent to employ the word in a narrow sense as meaning children. Such, for example, were *Silsbee* v. *Silsbee*, 211 Mass. 105, 109, and *Martin* v. *Holgate*, L. R. 1 H. L. 175. Unless the circumstances manifest a testamentary purpose to attribute to the word "issue" a signification other than its common one, it will be construed as including lineal descendants. The testator's daughter, Mrs. Bullock, did not decease "without leaving lawful issue," but on the contrary left two grandchildren, the children of her deceased daughter. The event upon which the gift over might have operated never happened. In principle the case at bar is indistinguishable from numerous decisions. See, in addition to those before cited, *Marsh* v. *Hoyt*, 161 Mass. 459, and *Soper* v. *Brown*, 136 N. Y. 244.

It becomes unnecessary to consider the question raised by the appeal of the guardians of the children of Mrs. Chesebrough.

Decree of Probate Court reversed.

CATHERINE HASEY *vs.* CITY OF BOSTON.

Suffolk. October 19, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Evidence, Declarations of deceased persons.

The preliminary decision of a presiding judge admitting in evidence a statement of a deceased person offered under R. L. c. 175, § 66, is not conclusive and, where all the evidence material to the question of the admission of the statement is contained in a bill of exceptions, the action of the judge may be reviewed by this court and can be held to be wrong because unsupported by any evidence.

In an action against a city under R. L. c. 51, § 18, for personal injuries sustained by reason of an alleged defect in a sidewalk consisting of bricks protruding two inches above the surrounding surface, where the defendant had introduced evidence that the sidewalk was in good condition and that the plaintiff slipped and fell by reason of fallen leaves collected on the sidewalk, the judge, against the plaintiff's exception, admitted under R. L. c. 175, § 66, a statement of a deceased police officer made before the commencement of the action and taken down by shorthand, in which he said that "the leaves had fallen all over the sidewalks, and, as I understand it, she slipped on those leaves. . . . I did not hear of the accident until after the notice came. This is a brick sidewalk and the bricks are all in very good condition." The judge did not hear the shorthand notes read, nor did he have any preliminary hearing, nor make any inquiry into the statement or the manner of obtaining it, except to be told that the witness was dead and that the statement was made before suit, that the declarant was one of the police force and "was the day man on this route." *Held*, that the admission of the statement was erroneous because it could not have been found to have been made "upon the personal knowledge of the declarant," and the declarant, if living, would not have been allowed to testify that he "understood" that the plaintiff slipped on the leaves or to express his opinion that the bricks were "in very good condition."

TORT under R. L. c. 51, § 18, for personal injuries alleged to have been sustained by the plaintiff on October 13, 1914, at about 8:30 A. M. from tripping and falling over some bricks protruding from the sidewalk of Moreland Street near or opposite Perrin Street in the part of Boston called Roxbury. Writ dated May 26, 1916.

In the Superior Court the case was tried before *White*, J. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the admission of certain evidence as the declaration of a deceased person under R. L. c. 175, § 66, as described in the opinion.

J. L. Sheehan, (*F. W. Miller, Jr.*, with him,) for the plaintiff.

W. P. Higgins, for the defendant, submitted a brief.

PIERCE, J. This is an action of tort to recover damages for injuries received by the plaintiff on October 13, 1914, from a fall to the sidewalk while walking on Moreland Street in the city of Boston.

The testimony of the plaintiff and of her witness tended to prove that she tripped, stumbled and fell over three or four bricks projecting "about two inches" above the surrounding surface of the sidewalk in the middle of the sidewalk. The testimony of the witnesses called by the defendant tended to prove that the sidewalk was in good condition, was without defect, that leaves were on the sidewalk, and that the plaintiff fell because she slipped upon the leaves and not because she tripped and stumbled over projecting bricks or other defects in the way.

In support of the defendant's position as to the cause of the fall, the defendant, subject to the exception of the plaintiff, offered in evidence, and the presiding judge submitted to the jury, a statement of a deceased police officer which was made before the commencement of the action and was taken in shorthand, which statement, as read to the jury from the shorthand notes, is as follows: "Patrolman Michael A. Hunt, day man on this division, says this accident occurred when we were having a warm spell, and the leaves had fallen all over the sidewalks, and, as I understand it, she slipped on those leaves. The leaves were very slippery. I did not hear of the accident until after the notice came. This is a brick sidewalk and the bricks are all in very good condition. There were more or less leaves all over the sidewalk. The nurse in the Hart Hospital told me that this — "

The decision of the judge is not conclusive and is reviewable as all the evidence material to the issue and question raised is contained in the bill of exceptions. *Ames* v. *New York, New Haven, & Hartford Railroad*, 221 Mass. 304.

It is stated in the bill of exceptions, and must therefore be taken to be the fact, that "Before allowing the witness to testify or read from her shorthand notes, the judge did not hear the shorthand notes read, nor did he have any preliminary hearing, nor make any inquiry into the statement or the manner of obtaining it, except to be told that the witness was dead, and that the statement was made before suit;" that the declarant "was one of the police force" and "was the day man on this route." In requiring the pre-

liminary decision of the presiding judge that the declaration of the deceased person was made in good faith before the commencement of the action and upon the personal knowledge of the declarant, the purpose of the statute, R. L. c. 175, § 66, was plainly to safeguard against the natural weakness of hearsay testimony, as also to make futile the temptation to attempt to introduce manufactured testimony and testimony which would not be competent were the declarant living at the trial. *Slotofski* v. *Boston Elevated Railway*, 215 Mass. 318. *Whitcomb* v. *Whitcomb*, 217 Mass. 558, 564. *Little* v. *Massachusetts Northeastern Street Railway*, 223 Mass. 501, 504. It is equally plain that the requirements of a preliminary decision upon the issues to be determined in the first instance by the presiding judge are not and cannot rationally be satisfied by the mere perfunctory determination of the preliminary issues of fact without knowledge of the substance at least of the proffered declaration. The admitted facts distinguish the case at bar from cases where the record is silent as to the procedure and adjudication of fact at the preliminary hearing, as also from cases where the excepting party has lost his right by failing to ask for appropriate rulings. In the case at bar it would not have been competent for the declarant if living to have testified that he "understood" the plaintiff slipped on the leaves or that the bricks were in very good condition. The first statement was not of his own knowledge, and the second was no more than an opinion upon an issue of fact which the jury were required to determine upon a consideration of all the pertinent testimony.

It is plain that the declaration was admitted as evidence without the preliminary hearing and decision required by the statute.

Exceptions sustained.

ATLANTIC MARITIME COMPANY *vs.* CITY OF GLOUCESTER.

Essex. October 19, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Practice, Civil, Report by judge. *Taxation,* Of tangible personal property. *Ship. Words,* "Decision."

Under the provision added to R. L. c. 173, § 105, by St. 1917, c. 345, that "A justice of the Supreme Judicial Court or of the Superior Court may, upon request of the parties, in any case where there is agreement as to all the material facts, report the case to the full court for determination without making any decision," in making such a report in a case where material facts are omitted from the statement of agreed facts that might be inferred from the facts stated it is the duty of a judge of the Superior Court to draw and report all the material inferences of fact.

Upon a petition against the city of Gloucester under St. 1909, c. 490, Part I, § 77, appealing from the refusal of the assessors of that city to abate a tax upon fishing vessels belonging to the petitioner, where the judge of the Superior Court before whom the case came for hearing reported it "without decision of the case" by agreement of the parties for determination by this court upon an "agreed statement of facts submitted as evidence," the reservation was discharged and the case was remanded to the Superior Court for further hearing, because the judge of that court had omitted to perform the duty of making a finding of fact as to the *situs* for taxation purposes of the vessels of the petitioner.

In the same case it appeared from the facts reported that the petitioner was a corporation organized under the laws of the State of Maine and having its home office at Kittery in that State, while its general offices where its books and papers were kept and its bills were paid were in Boston and the vessels all were registered under the laws of the United States in the office of the collector of the port of Boston, that all the vessels were on the high seas engaged in catching fresh fish and supplying them for the Boston market and at times also for markets in other States and occasionally, although infrequently, for the market of Gloucester, that at Gloucester the petitioner owned and continuously used a wharf on which were several buildings, including a storehouse, and that some of these buildings were used occasionally for the curing, storing and sale of the fish that were brought there by the petitioner's vessels, that the petitioner employed there a "boss of the wharf," who looked after the vessels as they arrived, and that all the petitioner's vessels went once or more each year to Gloucester for various purposes, including general repairs, additions to and renewals of their fittings, supplies and stock and for all purposes for which such vessels might resort to a harbor, although at times resort was had to other ports for these purposes. *Held,* that the fact that the petitioner's vessels put into the port of Gloucester regularly for repairs and for fitting out, that not being their home port or their port of registration, was not enough to fix their *situs* there for purposes of taxation, and that on the record the petitioner was entitled as matter of law to an abatement of the portion of its tax imposed upon these vessels.

PETITION, under St. 1909, c. 490, Part I, § 77, filed in the Superior Court on May 6, 1912, by the Atlantic Maritime Company, a corporation organized under the laws of the State of Maine, appealing from the refusal of the assessors of the city of Gloucester to abate a tax for the year 1911 imposed upon fishing vessels of the petitioner.

The case came on to be heard by *Lawton*, J., upon an agreed statement of facts submitted as evidence, whereupon the judge by agreement of the parties "in accordance with the provisions of St. 1917, c. 345," reported the case to this court for determination without making any decision thereon.

St. 1917, c. 345, added a last sentence to R. L. c. 173, § 105, as previously amended, so that that section now reads as follows:

"Section 105. A justice of the Supreme Judicial Court or of the Superior Court, after verdict, or after a finding of the facts by the court, may report the case for determination by the full court. If the justice is of opinion that an interlocutory finding or order made by him ought to be determined by the full court before any further proceedings in the trial court, he may report the case for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties. A justice of the Supreme Judicial Court or of the Superior Court may, upon request of the parties, in any case where there is agreement as to all the material facts, report the case to the full court for determination without making any decision thereon."

The case was submitted on briefs.

T. M. Vinson & C. D. Lanning, for the petitioner.

M. F. Buckley, for the respondent.

RUGG, C. J. This is a petition to the Superior Court by way of appeal under St. 1909, c. 490, Part I, § 77, from a refusal by the assessors of the city of Gloucester to abate a portion of the taxes assessed upon the petitioner for the year 1911. The case was sent to a commissioner under § 79, who made a report of certain facts. The facts thus found were presented by stipulation of the parties to a judge of the Superior Court as an "Agreed statement of facts submitted as evidence." He thereupon signed a report in these words: "By agreement of the parties the case is ordered to be reported to the Supreme Judicial Court without decision of the case by the court, in accordance with the provisions of St. 1917, c. 345."

The effect of that statute simply is to add a final sentence to § 105 of R. L. c. 173, as amended by St. 1910, c. 555, § 5. Under the law as it stood before this latest amendment a Superior Court judge could report to the full court questions of law arising in an action at law in two classes of cases only, (1) after a verdict by a jury, a power conferred first by St. 1859, c. 196, § 32, whereby the Superior Court was established, and (2) after a finding of the facts made by the judge, a power conferred first by St. 1878, c. 231, § 1. These two classes cover the vast majority of cases. No power was conferred by the statutes enacted before 1917 to report a case where there was an agreement by parties as to all the material facts. Although instances may be found where such cases have come before this court by report, *Berton* v. *Atlas Assurance Co.* 203 Mass. 134, and have been considered *sub silentio* without any question of practice being raised, almost without exception they have come by appeal from judgment ordered by the Superior Court which necessarily involved a determination of all questions of law as well as of fact in issue. See, for example, *Cunningham* v. *Connecticut Fire Ins. Co.* 200 Mass. 333, and cases cited; *Harmon* v. *Sweet*, 221 Mass. 587, 598, and cases cited. Manifestly the purpose of St. 1917, c. 345, was to confer upon the Superior Court authority to report a case when all the material facts were agreed and submitted to the court. It added to the two classes of cases above stated the power to report a third class of cases to the full court, namely, when all the material facts are agreed.

The word "decision" in the grant of power in the present statute to report "without making any decision thereon" is confined to decision of the issue of law raised at the trial. It put facts agreed upon the same footing as a verdict by the jury or a finding by the judge, so far as concerns power to report a case. The statute does not mean that, when a finding of fact must be made in order to present a pure question of law as decisive of the case, the judge of the Superior Court can omit to make that finding and merely pass the case on to be decided both as to fact as well as law by this court. Abandonment of the judicial function by the trial court was not intended by the statute. If material facts, whether primary or ultimate, express or inferential, are omitted from facts agreed and submitted, it becomes the duty of

the Superior Court judge to find those facts before he can report under the statute. Even though the ultimate facts may rest upon inferences, the duty of determining what inferences are the most rational, and of drawing such inferences from the other facts agreed, rests on the Superior Court judge before he can report the case. If such inferences need to be drawn in order to reach the ultimate essential facts, then there has not been "agreement as to all the material facts" by the parties within the meaning of those words in the statute.

The duty of weighing evidence and of finding facts in the first instance in an action at law is not an appropriate function of a court of last resort. The underlying principle of our judicial system is that the full bench of the Supreme Judicial Court in actions at law can consider and decide only questions of law. It is not designed that it should decide questions of fact. The present statute does not undertake to disturb that underlying principle. It was decided in *Churchill* v. *Palmer*, 115 Mass. 310, 313, that "The authority given by statute to the Superior Court to make reports to this court extends only to questions of law." This statement was quoted with approval in *Electric Welding Co. Ltd.* v. *Prince*, 200 Mass. 386, 392, where it was said further that "Questions of discretion or questions of fact of any other kind cannot be carried to the full court either by report or by exception or appeal." *Mann* v. *Brewer*, 7 Allen, 202, 204. In substance the same principle has been applied in many other cases, most of which decided up to that time were quoted in *Smith* v. *Lincoln*, 198 Mass. 388, 392, and need not here be repeated. Subsequent decisions, where the same principle has been declared, are *Commonwealth* v. *National Contracting Co.* 201 Mass. 248, *Scanlon* v. *Carey*, 207 Mass. 285, *Boucher* v. *Salem Rebuilding Commission*, 225 Mass. 18, *Salisbury Beach Associates* v. *Assessors of Salisbury*, 225 Mass. 399, *Mansfield* v. *Secretary of the Commonwealth*, *ante*, 262. Nothing contrary to this established principle can be supposed to have been in the mind of the court in *Williams* v. *Roxbury*, 12 Gray, 21, decided before the Superior Court was established.

A statement of agreed facts submitted as evidence is a recognized method of presenting a case to a court. It may cover the whole or a part of the facts essential to reach a conclusion, or to

raise a question of law. When a case is submitted in this way, St. 1913, c. 716, has no application because facts submitted as evidence are merely evidence and stand on the same general footing and fall within the same general classification as any other kind of evidence submitted to a jury or to a judge sitting without a jury, in that there must be a further finding of the ultimate fact or facts essential for the determination of the case, (unless those ultimate facts also are agreed) by the tribunal charged with finding the facts. *Frati* v. *Jannini*, 226 Mass. 430.

It appears from an examination of the record that the decisive question in controversy between the parties in the case at bar was whether certain fishing and other vessels belonging to the petitioner had such *situs* in Gloucester as to become there the subject of local taxation, the petitioner being a corporation organized under the laws of the State of Maine and having its home office at Kittery in that State, and all the vessels in question being enrolled or registered under the federal statutes in the office of the collector of the port of Boston. The *situs* of those vessels was mainly a question of fact. *Situs*, which means the place where a thing is, as applied to an object having a physical substance, is ordinarily a fact. It was at least a mixed question of law and fact. It is similar to the question of domicil, which usually is a question of fact. *Perkins* v. *Davis*, 109 Mass. 239. *Palmer* v. *Hampden*, 182 Mass. 511. *Olivieri* v. *Atkinson*, 168 Mass. 28. The submission of a case upon agreed facts to be considered as evidence is not necessarily equivalent to the submission of a case upon an agreement as to all the material facts. The "Agreed statement of facts submitted as evidence" in the case at bar does not contain a stipulation as to the *situs* of the vessels. Therefore it did not cover the whole field necessary to be covered before questions of law alone would arise on the record. It became the duty of the judge, before he rightly could report the case under the present statute, to make a finding of fact as to the *situs* for taxation purposes of the vessels of the petitioner before the question of law would be presented which he could report under the statute for the determination of this court. It follows that the report must be discharged and the case stand for further hearing in the Superior Court. *DeVeer* v. *Pierson*, 222 Mass. 167, 175.

It is, however, apparent that, unless all the evidence stated in the record warrants a finding that the vessels were physically situated in Gloucester in such sense as there to be subject to taxation, the petitioner must prevail as matter of law. The parties have agreed upon all the facts which they desire to submit to the court. The hearing and ultimate decision must be made upon these facts with the rational inferences of which they are susceptible. If as matter of law, upon these facts and the legitimate inferences flowing therefrom, but one conclusion can be reached, it is appropriate that a statement to that effect be made now for the guidance of the Superior Court upon its further hearing. See *John Hetherington & Sons, Ltd.* v. *William Firth Co.* 212 Mass. 257, 260. Considering the case in this aspect, or even regarding it as a case stated under the strict rules applicable to that method of presenting a question of law, (see *Frati* v. *Jannini*, 226 Mass. 430, 432, *Cunningham* v. *Connecticut Fire Ins. Co.* 200 Mass. 333,) the petitioner is entitled to recover. Since we are of opinion that as matter of law there is not sufficient evidence in the agreed statement of facts, with all rational inferences drawn therefrom in favor of the respondent, to support a finding in its favor, we proceed to discuss the case on its merits.

The pertinent facts in this connection summarily stated are that the petitioner is a corporation organized under the laws of Maine, having its home office at Kittery in that State and having from the date of its organization its general offices, including those of its president, treasurer and directors, in Boston, where its books and records were kept and where most of its bills were paid. It has complied with St. 1903, c. 437, § 60, as to filing certificates and documents permitting foreign corporations to do business within the Commonwealth, and has paid the excise tax levied on foreign corporations under St. 1909, c. 490, Part III, § 56. The vessels here in controversy were all enrolled or registered under the laws of the United States in the office of the collector of the port of Boston. When the petitioner acquired an interest in any vessel registered elsewhere, its enrolment was immediately changed to Boston, two having been thus changed from Gloucester to Boston. All of the vessels were upon the high seas the greater portion of each year, the principal part of the business carried on with the vessels being the catching and supplying of fresh fish

to the Boston market, but at times also to markets of New York, Newport, Norfolk, Portland in Maine, and occasionally, but infrequently, of Gloucester. Most of the vessels sailed on "quarters" or "fifths," being chartered by the captain, who incurred the expense and conducted the business of the voyage, returning to the owner after some deductions one fourth or one fifth of the proceeds of the voyage. This chartering was done chiefly in Boston, although some was done in Gloucester. Some vessels were operated on the halves, the owner retaining control and conducting the business and dividing one half the proceeds, less some deductions, with the crew. The catches of fresh fish made by these latter vessels generally were sold in ports of other States and the salted fish were brought to Boston and occasionally to Gloucester. The corporation had no dock nor wharf nor storehouse in Boston or elsewhere, except in Gloucester, save as for a few days at a time it might hire wharfage for a particular vessel. But it established in 1909 and since has maintained, in the building in which it had its office, a store for the sale of groceries, fishermen's clothing and general supplies for fishing vessels. In 1906 the corporation hired, and in 1909 bought and continuously has used since in Gloucester, a wharf on which are located several buildings including a storehouse, and connected with which is a dock. Some of these buildings have been used occasionally for the curing, storing and sale of fish as they might be brought there on the petitioner's vessels. On this wharf has been maintained a store for the sale of groceries and general fittings and supplies for fishing vessels, and a bookkeeper has been employed regularly in this store. It also employed at this wharf a "shore captain," who had to do with the hiring and discharging of captains of vessels, determining the kind of fishing to be engaged in, and who performed other managerial duties in the absence of some superior officer of the petitioner, but always under the general direction of the president of the corporation in Boston. There was also employed a "boss of the wharf," who looked after the vessels as they arrived, landing and storing what they discharged and shipping what they took. All the vessels went once or more each year to Gloucester for various purposes, including general repairs and additions to and renewals of their fittings, supplies and stock, and for all purposes for which such vessels might resort

to a harbor, lie in dock, or be hauled out on a marine railway. Gloucester was the most convenient and economical port for such purposes and therefore the greater part of all such matters were there carried on, although at times resort was had to other ports for these purposes.

Tangible personal property is deemed for many purposes to have its *situs* at the domicil of its owner. But generally the power of the several States of the Union under the Federal Constitution to levy taxation upon such property is held to rest upon its actual physical situation or keeping for use within the jurisdiction of the taxing State. *Scollard* v. *American Felt Co.* 194 Mass. 127, 129. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194. *Delaware, Lackawanna & Western Railroad* v. *Pennsylvania*, 198 U. S. 341. *Selliger* v. *Kentucky*, 213 U. S. 200, 204. The rule is different as to an absolute sovereign, such as is the United States, which may levy a tax upon property of its citizens not kept upon its territory. *United States* v. *Bennett*, 232 U. S. 299.

Vessels are personal property and taxable as such under our statutes, even though belonging to a non-resident, provided their *situs* is found to be within the city or town levying the tax. *Tobey* v. *Kip*, 214 Mass. 477. See *New England & Savannah Steamship Co.* v. *Commonwealth*, 195 Mass. 385. But they are a peculiar kind of personal property. They are built for navigation and not for remaining stationary. Their value consists in being engaged in navigation, not in being permanently located in a single place. The statutes of the United States require that vessels like these shall have a port of registration. U. S. Rev. Sts. §§ 4141, 4178. 26 U. S. Sts. at Large, c. 250, § 1. 29 U. S. Sts. at Large, c. 67, § 1. The question of *situs* in connection with the taxation of vessels thus registered and engaged in commerce on the high seas and between the several States depends largely upon decisions of the United States Supreme Court as the court of last resort on such a matter. Hence, it is necessary to refer to its decisions.

In *Hays* v. *Pacific Mail Steamship Co.* 17 How. 596, the vessels were registered in New York, where the owner resided. The owner had a naval dock and ship yard in California, where vessels engaged in commerce on the high seas and between ports of the several States resorted for being furnished and repaired, and they spent a considerable time in the ports of that State. But it was

held that such vessels were not within the jurisdiction of the State of California for purposes of taxation and that their *situs* for that purpose was at their home port of New York. In *Morgan* v. *Parham*, 16 Wall. 471, a vessel owned and having her home port of registration in New York was also enrolled at Mobile in the State of Alabama, where a wharf and office were occupied for her use and whence she had sailed for many years in commerce between the States, without going to New York. She was held not to be subject to taxation in Mobile. In *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409, the facts were that vessels owned by an Illinois corporation and plying between places on the Mississippi, Ohio, Tennessee and Cumberland rivers in interstate commerce, were registered and enrolled at Paducah in the State of Kentucky, where also they were kept when not in use. All the earlier cases are reviewed in an exhaustive opinion. It there was said at pages 422, 423: "Quite recently, in *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, the foregoing authorities [including among others those here cited] were approvingly cited, and were in effect reaffirmed. In that case the vessels were enrolled in New York, the domicil of the owner, but, although engaged in interstate commerce, the vessels were navigated wholly within the limits of the State of Virginia, it was held that they came within the exception to the general rule which we have previously stated, and were properly taxable in Virginia. As in the case at bar, the owner of the vessels was domiciled in Illinois and the vessels were not employed exclusively in commerce between points in the State of Kentucky, but were engaged in traffic between that State and the ports of other States, including Illinois, it seems obvious that, as a question of fact they had no permanent *situs* in the State of Kentucky within the rule announced in the Old Dominion Steamship case." These principles were stated anew and reaffirmed with a full review of previous decisions in *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, though there applied to different facts not analogous to those here presented. *Yost* v. *Lake Erie Transportation Co.* 50 C. C. A. 511 (112 Fed. Rep. 746) was decided by a court of which Mr. Justice Day and the late Mr. Justice Lurton, then circuit judges, were members, the opinion being delivered by the latter. The facts were that vessels, owned by a Michigan corporation, having as their home

port Monroe and as their port of registration Detroit, both within the State of Michigan, plied in interstate commerce between Toledo in the State of Ohio and ports of other States chiefly on Lake Erie. The majority of the directors and officers resided in Toledo, where also the general manager had his office, where the vessels commonly wintered and where the officers and crews were employed and discharged. It was held after a thorough discussion that the State of Ohio had no jurisdiction for the purpose of taxation.

The principles declared in these cases seem decisive against the validity of the tax assessed upon the vessels of the petitioner here in question by the assessors of the city of Gloucester. The facts in the case at bar are no stronger toward fixing the *situs* of these vessels at Gloucester than were the facts as to *situs* in most of the decisions to which reference has been made. These vessels were not employed exclusively within the territorial waters of Massachusetts, but were engaged in commerce upon the high seas and between different States. The circumstance that they put into the port of Gloucester regularly for repairs and for fitting out, that not being their home port or port of registration, is not enough to fix their *situs* for the purpose of taxation.

The petitioner is entitled as matter of law, under the stipulation of the parties, to an abatement in the sum of $760 with interest from April 18, 1912, at the rate of six per cent per annum, without costs. A decision to this effect is the only conclusion which as matter of law can be reached upon this record.

Report discharged.

Case to stand for further hearing in accordance with this opinion.

JOHN GOODWIN *vs.* CITY OF FALL RIVER.

Bristol. October 22, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Way, Public: defect. *Notice.*

The "physical or mental incapacity" which enlarges the period of thirty days within which by R. L. c. 51, §§ 20, 21, a traveller injured by reason of a defect in a highway is required to give notice of the time, place and cause of the injury, in order to recover under § 18 of the statute, is an inability of the person injured to give the notice himself or through another which resulted from a loss of the faculties of the mind or from a lack of power to use the mind because of the loss or impairment of the organs of the body. Mere physical inability to move or to be moved about or to write is not evidence of mental or physical inability.

It seems that an injury caused by the omission of a city to light a street by reason of which a traveller stepped into a hole or depression in a sidewalk was not caused by a defect in the highway. Citing *Lyon* v. *Cambridge*, 136 Mass. 419.

TORT under R. L. c. 51, § 18, for an injury alleged to have been sustained on March 16, 1914, by reason of a defect or want of repair in the sidewalk of South Main Street in Fall River. Writ dated May 20, 1914.

In the Superior Court the case was tried before *White*, J. The evidence bearing upon the question of notice is described in the opinion. The plaintiff when injured was walking with one Greenwood and other young men who had joined them. "The young men had been walking on the sidewalk when they came to a puddle and turned out to the edge near the curbing. They then proceeded in single file, walking on the curb stone, the plaintiff being the third or fourth in the group, and walking behind Mr. Greenwood. The young men had passed the puddle and stepped farther into the sidewalk on the right, and the plaintiff, following the men who had preceded him, was going ahead when his right foot sank into a hole, and his shoe was caught and held him so that he was thrown over on his side. He was picked up and fell over again and then was helped up and, although he contended at the trial that his leg was broken and he had received a Potts fracture, he did not know it at the time and was able to hobble away. The fact that he had received a break or Potts fracture was in dispute at the

trial. The hole into which the plaintiff had stepped was about ten inches long, three or four inches wide and two or three inches deep. It was caused by a cobble stone which had been placed there sinking into the ground. The place where the accident happened was where a passageway was made across the sidewalk into the adjoining property. The sidewalk was generally curbed north from Dwelly Street, but in this place there was a break in the curbing of about eight or nine feet to allow for the passageway. The sidewalk was made of dirt or cinders and was about four inches above the level of the gutter. Leading up from the level of the gutter to the sidewalk were some paving blocks set in three rows, one higher than the other. One of these paving stones in the middle row had sunk into the ground so that the hole of the size mentioned surrounded by other paving blocks existed and had been in that condition for at least one or two months. The spot where the accident happened was in the sidewalk to the east of the eastern line of the curbing. The plaintiff was a stranger in Fall River and had never been over the place of the accident before."

At the close of the evidence the judge on motion of the defendant ordered a verdict for the defendant; and the plaintiff alleged exceptions.

R. L. c. 51, §§ 20, 21, are as follows:

"Section 20. A person so injured shall, within ten days thereafter, if such defect or want of repair is caused by or consists in part of snow or ice, or both, and in all other cases, within thirty days thereafter, give to the county, city, town or person by law obliged to keep said way, causeway or bridge in repair, notice of the time, place and cause of the said injury or damage; and if the said county, city, town or person does not pay the amount thereof, he may within two years after the date of said injury or damage recover the same in an action of tort. Such notice shall not be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury, if it is shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby.

"Section 21. Such notice shall be in writing, signed by the person injured or by some one in his behalf, and may be given, in the case of a county, to one of the county commissioners or the county treasurer; in the case of a city, to the mayor, the city clerk or

treasurer; and in the case of a town, to one of the selectmen or to the town clerk or treasurer. If by reason of physical or mental incapacity it is impossible for the person injured to give the notice within the time required, he may give it within ten days after such incapacity has been removed, and in case of his death without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give the notice within thirty days after his appointment."

C. R. Cummings, (*J. W. Nugent* with him,) for the plaintiff.

G. Grime, for the defendant.

PIERCE, J. This is an action to recover damages for personal injuries sustained by the plaintiff by stepping into a hole in the sidewalk, while walking along South Main Street, in the city of Fall River, a public highway which the defendant is bound to keep in repair so that it may be reasonably safe and convenient for travellers. The accident occurred on the evening of March 16, 1914, between seven and seven thirty o'clock. The notice of the claim for injuries sustained was served upon the city of Fall River on April 18, 1914, thirty-three days after the accident. The question presented is, whether the physical or mental incapacity of the plaintiff was such that he could not give the notice himself, or by any ordinary means at his command procure the notice to be given on his behalf, within thirty days of the accident. R.L. c. 51, §§ 20, 21. *Saunders* v. *Boston*, 167 Mass. 595. *Barclay* v. *Boston*, 167 Mass. 596.

The plaintiff's injury was a broken ankle, a Potts fracture. He testified that he lived in Pawtucket, Rhode Island; that he came to Fall River on the afternoon of the accident; that he had to borrow money to come to Fall River; that he was out of work at the time and was looking for a job; that when he was hurt he was walking along one of the streets in the southern part of the city, but did not know its name; that the night was dark; that you could hardly see your hand in front of you; that it was so dark he could not see where he was going; that he did not know the points of the compass in Fall River or in which direction he was going; that he was being taken by one Greenwood, whom he had met at five o'clock that afternoon, to a moving picture show; that on the way they were joined by several other men whom he did not know; that after the accident he went two or three blocks along

to the moving picture show; that he stayed there ten or fifteen minutes; that his foot swelled up and burst his shoe lace; that he could not stand the pain; that he hobbled down the steps until he got to the street; that Greenwood took him on his back and carried him to his (Greenwood's) home where he stayed that night; that Dr. Perron attended him that night; that the next morning he went home to Pawtucket with Greenwood; that Dr. Dunbar sent him to a hospital in Providence, Rhode Island, where he remained eight days; that he then returned home and remained in the house until the evening of April 17; that on that evening he went to see a lawyer in Providence; that on April 18 he went to see a lawyer in Fall River, with his youngest sister; that he came with a crutch and stick and the plaster cast on his leg just the same as when he came out of the hospital; that he went to Mr. Cummings's office and at that time was not able to tell where he got hurt; that his sister located Greenwood, who came to the lawyer's office; that he did not know Greenwood's address at all and was unable to send any letter to him.

The plaintiff further testified that he was not well acquainted with Greenwood, whose uncle was married to his sister; that he had met Greenwood only once before in Pawtucket when Greenwood wrote down his residence on a piece of paper, which the plaintiff brought with him when he first came to Fall River; that Dr. Dunbar attended him after he came from the hospital twice or three times; that two doctors treated him in the hospital; that one came to see him several times a day; that the nurses were giving him his meals and attending to his physical wants; that he had six sisters, two of whom were unmarried; that his youngest sister came to his house pretty often; that it was not once a day, — he could not tell how often; that there was a nurse looking after his wife, who was an experienced nurse; that she was there at the house all the time after he came from the hospital and nursed him also; that his wife's sisters worked but came sometimes to see his wife; and that they were there when he was home about once a week; that he told them how he got hurt.

In addition, the plaintiff offered to show that he had no means to employ anybody, or to pay anybody, and there was nobody at hand available to give any notice or to find out for him where the accident happened; and he further offered to show that he was

unable to go out of the house, that he was unable to point out to anybody the place where he was hurt or to give any directions to go and find out, and that he did not know the place and could not give any description of it to anybody.

On motion the presiding judge directed a verdict for the defendant. We think the direction was given rightly. The physical or mental incapacity which enlarges the period of limitation within which notice as a condition precedent to a right to maintain an action must be given, is an inability of the person injured to give the notice himself or through another which results from a loss of the faculties of the mind, or from a lack of power to use the mind because of the loss or impairment of the organs of the body. Mere physical inability to move or to be moved about or to write are not evidence of mental or physical incapacity. *Mitchell* v. *Worcester*, 129 Mass. 525. *McNulty* v. *Cambridge*, 130 Mass. 275. *Lyon* v. *Cambridge*, 136 Mass. 419. Ignorance of facts upon which the ability of the person injured may depend to give notice is not evidence of mental or physical condition; nor is the want of means to employ assistance to give the notice or to find out where the accident happened evidence that the plaintiff was incapable of giving the notice within thirty days because of mental or physical incapacity. The evidence which the plaintiff offered in proof of mental incapacity, as described above, was excluded rightly.

On the facts this case cannot be distinguished from *Lyon* v. *Cambridge*, *supra*.

Exceptions overruled.

FRANK M. CHACE *vs.* BENJAMIN B. GARDNER, executor.

Bristol. October 22, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Frauds, Statute of. Equity Jurisdiction, To establish oral trust. *Trust*, Oral in personal property.

The owner of certain real estate conveyed it to his sister by an absolute deed without pecuniary consideration but with an oral agreement on her part that she should hold the land in trust for her own benefit during her life and that after

her death it should become the property of the grantor's son, and that, if the real estate should be converted into money, the proceeds from the sale should be held by the grantee to enjoy the income during her life and that on her death the grantor's son should be the sole beneficiary and owner of such proceeds. The grantee sold the real estate during her lifetime and deposited the proceeds in certain bank accounts, where it could be traced. After the death of the grantee, the grantor's son brought a suit in equity against the executor of the grantee's will to enforce the oral trust against the proceeds from the sale in the hands of the defendant. It was agreed that the part of the statute of frauds contained in R. L. c. 147, § 1, should be treated as having been pleaded. *Held*, that the part of the oral agreement relating to the proceeds of the sale was separate and distinct from the part relating to the real estate and could be enforced as a valid oral trust in personal property which the defendant had in his possession.

BILL IN EQUITY, inserted in a common law writ dated July 21, 1914, against the executor of the will of Katherine F. Gardner, late of Swansea, the aunt of the plaintiff, praying that a trust in favor of the plaintiff be established in a fund of $2,500 in the hands of the defendant as executor, which constituted the proceeds from the sale of certain real estate in Swansea, as described in the opinion.

In the Superior Court the case was heard by *Dubuque*, J., who made findings of fact, which are stated in substance in the opinion, and ruled that upon the facts found the plaintiff was entitled to recover the amount of the proceeds from the land sales, namely, $2,224.75 with interest from the date of the writ. Later by order of the judge a final decree was entered for the plaintiff; and the defendant appealed.

R. L. c. 147, § 1, is as follows: "No trust concerning land, except such as may arise or result by implication of law, shall be created or declared unless by an instrument in writing signed by the party or by the attorney of the party creating or declaring the trust."

L. E. Wood, for the defendant.

S. P. Hall, for the plaintiff.

CARROLL, J. It was found by the judge who heard this suit in equity that the plaintiff's father, Charles F. Chace, and Katherine F. Gardner (brother and sister) owned two tracts of land in Swansea; that by partition proceedings one tract was set off to Charles and one to Katherine; that on September 18, 1880, Charles conveyed to his sister the parcel owned by him, by warranty deed in the usual form, without consideration being paid by the grantee

to the grantor, upon the oral agreement that she should hold the land in trust for her own benefit during her life, and after her death it was to become the property of the plaintiff; that, if said real estate was converted into money, the proceeds of the sale were to be held by the grantee to enjoy the income thereof during her life, the plaintiff to be the sole "beneficiary and owner of the principal of said proceeds after his aunt's death;" and that this agreement was made known to the plaintiff by his father and by the grantee. He further found that Mrs. Gardner sold the land in 1907 and 1909, for the sum of $2,245.75, and deposited the proceeds in several banks in Fall River "(without mention of any trust) where the same are traceable now; but mingled with other money of hers."

Mrs. Gardner died in 1914. The defendant is the executor of her will. The presiding judge states that "The statute of frauds does not appear to have been pleaded," but it was agreed that the case might be heard as though it had been pleaded. A decree was entered in the Superior Court declaring that the plaintiff was entitled to the proceeds arising from the sale of the real estate, amounting to $2,245.75 and ordering the defendant to pay that sum of money to the plaintiff. The defendant appealed.

If the oral agreement concerned the real estate alone the statute would apply, the trust could not be enforced and no constructive trust would arise. R. L. c. 147, § 1. *Campbell* v. *Brown*, 129 Mass. 23. *Tourtillotte* v. *Tourtillotte*, 205 Mass. 547. The statute requiring an instrument in writing for the creation or declaration of a trust applies to a trust concerning land only; an oral trust in personal property is valid. *Chase* v. *Perley*, 148 Mass. 289. *Taft* v. *Stow*, 167 Mass. 363.

The judge found that the grantee converted the real estate into money and the fund arising from the sale was in existence at the time of her death; he also found, and there was sufficient evidence to support the finding, that when Mrs. Gardner received the deed of real estate she agreed, if the real estate was converted into money, to hold the proceeds, the income to be hers during her life, the principal to be payable to the plaintiff on her death.

That part of the agreement relating to the proceeds of the sale is separate and distinct from the part relating to the land. When the real estate was converted into money Mrs. Gardner held it as she agreed to hold it when the trust was created; and this trust in

personal property did not require a memorandum in writing. The bill is not brought to enforce an oral trust in land; it is brought to enforce a trust in personal property which the defendant has in his possession, and where nothing remains to be done except the payment by the defendant of the amount which he holds as the executor of the trustee.

The rule governing cases of this kind was stated by Mr. Justice Metcalf in *Rand* v. *Mather*, 11 Cush. 1, 7, as follows: "The true doctrine is this: If any part of an agreement is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the statute does not, either expressly or by necessary implication, render the whole void; and provided, furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant."

In *Trowbridge* v. *Wetherbee*, 11 Allen, 361, 364, Chapman, J., speaking of the statute of frauds, said: "If some of the stipulations in a contract are within the statute and others are not, and those which are within it have been performed, an action lies upon the other stipulations, if they are separate." The plaintiff in *Zwicker* v. *Gardner*, 213 Mass. 95, a mortgagor of real estate, was allowed to recover on an oral agreement made with the mortgagee that if the plaintiff would not bid at the foreclosure proceedings, the mortgagee would pay to him the balance that remained after deducting the mortgage, interest and expenses. It was there held that the action was not to enforce an oral contract for the sale of land; that the land had been sold and a part of the contract relating to it had been executed and it was separable from the part of the contract which concerned the excess. The same principle applies in the case at bar: Mrs. Gardner's executor holds the proceeds of the sale by reason of an agreement made by his testatrix that this money was to belong to the plaintiff after her death. This section of the agreement is separable from the part relating to the real estate, to which part alone the statute applies, and which has been fully performed. See *Page* v. *Monks*, 5 Gray, 492; *Wetherbee* v. *Potter*, 99 Mass. 354, 361; *Lyman* v. *Lyman*, 133 Mass. 414; *Graffam* v. *Pierce*, 143 Mass. 386.

Accordingly, where land has been conveyed on a parol trust to hold the proceeds for a certain purpose, if that event has taken place and the land is converted into money, the statute of frauds

is not a defence. The trust will be enforced although there was no declaration of trust subsequent to the conversion. *Lasley* v. *Delano*, 139 Mich. 602. *Bork* v. *Martin*, 132 N. Y. 280. *Logan* v. *Brown*, 20 Okla. 334. And see *Bailey* v. *Wood*, 211 Mass. 37.

There are some decisions at variance with what is here decided. See 39 Cyc. 52, where the cases are collected. But we think the conclusion which we have reached is supported by both principle and authority. In view of what has been said it is unnecessary to consider the other questions which have been discussed.

Decree affirmed with costs.

EDWARD H. R. GREEN & others, trustees, *vs.* WILLIAM H. HUSSEY & others.

Bristol. October 22, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Devise and Legacy. Words, "Lineal descendants."

A testatrix, who made her will and died when Gen. Sts. c. 91, § 1, cl. 1, was in force, created a trust, under which the net income of a residuary fund was to be paid to a niece of the testatrix during her life and, upon the death of such niece, the trustees were ordered to distribute and divide the whole of the residuary estate "to and among all the lineal descendants then living of my grandfather, G H, and if all the lineal descendants aforesaid then living are in the same degree of kindred to the said G H, they shall share the said Estate equally and shall be paid in equal shares; otherwise they shall take according to the right of representation, and the said Trustees shall pay them respectively such portions as shall according to the right of representation belong to them." The testatrix died in 1865. Her grandfather, G H, died in 1823. Her niece, who was the beneficiary for life, died in 1916. At the time of the death of the niece no child of G H was living. Three of his grandchildren were living and there were living descendants of forty-two other grandchildren. *Held*, that each of the three living grandchildren of G H took one forty-fifth part of the residue and that one forty-fifth part should be distributed among the descendants of each of the other forty-two grandchildren by right of representation in accordance with the rule for the distribution of intestate estates established by Gen. Sts. c. 91, § 1, cl. 1, which was the same rule established by the statutes in force at the time of the death of the beneficiary for life.

Where the language of the residuary clause in a carefully drawn will incorporates the language of the statute of distributions in force when the will was made, which also was in force at the time of the death of the testator, and where no reason is shown for a different interpretation, the construction of the clause should follow the judicial construction of the statute.

PETITION, filed in the Probate Court for the county of Bristol on August 29, 1916, by the trustees under the will of Sylvia Ann Howland, late of New Bedford, who died on July 2, 1865, for a decree authorizing the distribution of the trust fund held by them among the lineal descendants of Gideon Howland, late of Dartmouth, (who died on May 23, 1823,) who were living at the death of Hetty Howland Robinson Green, the beneficiary for life under the trust, who died on July 3, 1916.

It appeared that of the grandchildren of Gideon Howland there were on July 3, 1916, forty-five who either were living or whose descendants were living at that date; and that of these forty-five grandchildren three were living on July 3, 1916, and forty-two had died.

The Probate Court made a decree ordering that the trustees should convert the trust estate into cash and should distribute the proceeds to the persons named therein in the proportions there stated, giving to each of the three living grandchildren one forty-fifth share and to the descendants of each of the other forty-two grandchildren in question one forty-fifth share.

Certain of the respondents appealed from the decree.

The case came on to be heard before *Crosby*, J., who by agreement of counsel reserved all questions of law arising in the case upon the record and an agreed statement of facts for determination by the full court, such decree to be entered as justice might require.

O. Prescott, for the petitioners, stated the case.

J. C. O'Conor (of New York), for the executors under the will of W. F. Mott and for Edith M. Doan.

E. A. Stern (of New York), for the respondent Howland Bowne.

F. A. Milliken, for the respondents Gideon Allen, Jr., and others.

W. C. Parker, for the respondent Daniel H. Grinnell.

H. C. Hunt (of New Jersey), for the respondent William H. Hussey.

W. Harison & H. A. Cushing, for the respondents Irving Grinnell and Josephine Grinnell Smith, submitted a brief.

J. E. N. Shaw, for the respondents Louisa I. Sawyer and others, submitted a brief.

G. Geils, Jr., guardian *ad litem* for Mary A. Labadie and others, submitted a brief.

BRALEY, J. The testatrix by the twelfth or residuary clause of her will created a trust the net income of which was to be paid to Hettie H. Robinson during her life, and upon her decease the trustees and their successors in office were directed and ordered to pay over, distribute and divide the whole of the residuary estate "to and among all the lineal descendants then living of my grandfather, Gideon Howland, and if all the lineal descendants aforesaid then living are in the same degree of kindred to the said Gideon Howland, they shall share the said Estate equally and shall be paid in equal shares; otherwise they shall take according to the right of representation, and the said Trustees shall pay them respectively such portions as shall according to the right of representation belong to them." The equitable life estate having terminated, the trustees are required to make distribution, and the questions for decision are who are the persons entitled to participate, and, when they are ascertained, in what proportions are they to share the fund. Gideon Howland died on May 23, 1823, and none of his thirteen children were living at the date of the will. The words "lineal descendants" however embrace all those even to the remotest generation who by consanguinity trace their lineage to him. *Houghton* v. *Kendall*, 7 Allen, 72, 76. *Swasey* v. *Jaques*, 144 Mass. 135, 138. *Leonard* v. *Haworth*, 171 Mass. 496. *Morse* v. *Hayden*, 82 Maine, 227, 230. *Levy* v. *M'Cartee*, 6 Pet. 102, 112. *Ralph* v. *Carrick*, 11 Ch. D. 873, 883. It appears that eleven of the children had issue, and if his forty-five grandchildren had all been living when the life estate fell in, they would have shared the residue in aliquot parts. *Knapp* v. *Windsor*, 6 Cush. 156, 162. But, even if only three survived, the survivors with the issue of the deceased forty-two grandchildren fully answer the designation. It is in substance contended by the appellants, that, as the grandchildren and great-grandchildren are not in the same degree of kindred, and hence cannot take in equal shares, and as the line of descent begins with Gideon's children who had issue, and as all the lineal descendants living when the time for their ascertainment culminated were the issue of those children, the residue first should be divided into eleven parts instead of into forty-five parts, and distribution decreed accordingly. *Allen* v. *Boardman*, 193 Mass. 284, 287.

This construction however reads out of the will "if all the lineal

descendants aforesaid then living are in the same degree of kindred," as well as the words "right of representation," if the lineal descendants while one in blood were of diverse kinship. The clause in question is free from ambiguity, and its wording clear and exact. If the testatrix had intended that division should be based in accordance with the number of her uncles and aunts who had predeceased her leaving issue, she would have said so in unmistakable terms. It is her intention which must control, and be given effect unless forbidden by some positive rule of law. The Gen. Sts. c. 91, § 1, cl. 1, as to intestate estates were in force when the will was executed, and when the testatrix died. It is there provided, that an intestate's interest in "land, tenements, or hereditaments" shall descend subject to his debts "In equal shares to his children and the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants; if all the descendants are in the same degree of kindred to the intestate, they shall share the estate equally; otherwise they shall take according to the right of representation." And by § 12, "Inheritance or succession, 'by right of representation,' takes place when the descendants of a deceased heir take the same share or right in the estate of another person that their parent would have taken if living. . . ." It was settled when she died that the nearest in degree of the descendants of her grandfather would take equally, not by inheritance from their parents, because nothing passed to their parents which the grandchildren could inherit, but by force of the will as the nearest living blood kin. *Knapp* v. *Windsor*, 6 Cush. 156. *Sedgwick* v. *Minot*, 6 Allen, 171. The testatrix intended equality of division, and as we have said she took in all living lineal descendants of every degree. A comparison of the essential words shows that the will follows the language of the statute. The reproduction cannot be regarded as a mere coincidence in an instrument where clarity and accuracy of statement are everywhere apparent. Its language having been incorporated, no sufficient reason has been shown why the judicial construction of the statute should not be followed and the purpose of the testatrix effectuated. The Pub. Sts. c. 125, § 1, cl. 1, which re-enacted Gen. Sts. c. 91, § 1, cl. 1, were construed in *Balch* v. *Stone*, 149 Mass. 39, where it was held that those nearest in degree to the intestate took *per capita* while

those in a more remote degree took *per stirpes* by right of representation. The R. L. c. 133, § 1, recodified Pub. Sts. c. 125, § 1, and the rule of property announced in *Balch* v. *Stone* has been followed with approval in *Codman* v. *Brooks*, 167 Mass. 499, 503, *Paine, petitioner*, 176 Mass. 242, 245, *Boston Safe Deposit & Trust Co.* v. *Blanchard*, 196 Mass. 35, 41, and *Thompson* v. *Thornton*, 197 Mass. 273, 277, all of which under varying provisions dealt with the devolution of testate estates. We are therefore of opinion that the decree of distribution of the court of probate, that the three grandchildren each should have one forty-fifth of the residue while the remaining forty-two forty-fifths is to be divided among those of more remote degree who take by right of representation the fractional proportions therein stated, should be affirmed.

Ordered accordingly.

EMILY TOD *vs.* WILLIAM G. MITCHELL & others, executors.

Middlesex. October 16, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Marshalling Assets. Equity Jurisdiction, To marshal assets. *Widow.*

In the absence of some special ground for relief a court of equity will not entertain a bill to marshal the assets of an estate between assets within the jurisdiction of the court and assets in a foreign country.

A suit in equity cannot be maintained by a widow to marshal the assets of her husband's estate by ordering the executor of his will to pay the debts and charges of administration out of the proceeds from the sale of real estate owned by him in a foreign country and not out of the assets of his estate in this Commonwealth.

In a suit in equity to marshal the assets of an estate, a creditor who can hold for the satisfaction of his claim two separate funds belonging to the estate cannot be compelled to address himself first to the one which the plaintiff cannot claim when to do so would result in unreasonable delay and inconvenience or would involve litigation in the collection of his debt.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 26, 1916, and amended on February 16, 1917, by Emily Tod of Liverpool in England, the widow of James Tod, late of Malden, who died on January 26, 1915, against the executors of the will of

James Tod, praying that the defendants be restrained from collecting a note made by the testator for $5,000 payable to the defendant William G. Mitchell out of the assets of the estate of the testator in Massachusetts and that they be ordered to collect the expenses of administration and the debts of the estate of James Tod out of the assets of his estate in England.

The allegations of the bill as amended are stated in the opinion. The defendants demurred to the bill and alleged the following causes of demurrer:

"1. That the plaintiff has not stated in her bill such a cause as entitled her to any relief in equity against these defendants.

"2. Because it appears by said bill the assets belonging to the estate of the late James Tod which are in England are not within the jurisdiction of this court."

The case came on to be heard on the bill as amended and the demurrer before *Pierce*, J., who by agreement of all the parties reserved it for determination by the full court.

J. B. Studley, for the plaintiff.

A. P. Worthen, for the defendants.

PIERCE, J. This is a bill to marshal the assets of a Massachusetts testator for the benefit of his widow. It comes before this court upon a reservation of the bill as amended and a demurrer thereto.

The amended bill alleges in substance that the plaintiff, now living in England, is the lawful widow of James Tod, who died on January 26, 1915, a resident of and domiciled at Malden, Massachusetts, without issue and testate; that the testator in round numbers left an estate of $23,000, made up of real estate in England worth $15,000, real estate in Massachusetts worth $4,000, and personal property in Massachusetts worth $4,000; that the estate owed no debts except a note of $5,000 to the defendant William G. Mitchell and funeral expenses of $300 which the executors have paid out of the personal property in Massachusetts; that under the law of the United Kingdom of Great Britain and Ireland the real estate in England is liable for all debts of the testator wherever incurred, for the funeral expenses and for the expenses of administration in England and Massachusetts; that on April 20, 1915, the will of James Tod was allowed by the Probate Court for the County of Middlesex, and ancillary administration of the estate was granted in England on January 1, 1916; that the defendants,

William G. Mitchell, Richard Mitchell and John W. Kelly were duly appointed and qualified as executors of the will, and in accordance with the provisions of the statutes of the Commonwealth the said John W. Kelly, domiciled in England, appointed said Richard Mitchell his agent for service of process upon him; that the widow in writing waived the provisions made for her in the said will, claimed such portion of the estate of her husband as she would have taken if he had died intestate, and caused her written waiver to be duly filed in the registry of probate for the said county of Middlesex on May 20, 1915; that her waiver is not effective as to the said real estate in England but the same is to be disposed of as is provided in said will; that the executors are requested, authorized and empowered by the testator to sell the real estate in England as soon as may be after his decease, by public auction or by private sale, using their own discretion as to time and terms; that the executors propose to pay the said debt due to the said William G. Mitchell out of the personal property in Massachusetts to the extent of this personal property, and the balance out of the real estate, and propose to pay all the expenses of administration out of Massachusetts assets. The bill further alleges that if the executors pay the debt and expenses of administration out of the Massachusetts assets, the plaintiff will be deprived of her lawful share of the assets in Massachusetts.

The plaintiff prays that the defendant William G. Mitchell be restrained from collecting any part of his claim against the estate out of the assets of the estate in Massachusetts, that he be required to collect his claim out of the assets in England; that the defendants as executors be restrained and enjoined from paying any part of the debt or expenses of administration of the said estate out of the assets in Massachusetts and be required to collect the same out of the assets of the estate in England.

The doctrine of marshalling assets in behalf of legatees, distributees and creditors, rests upon the equitable rule that where a claimant has a right in the nature of a lien to two funds to which he may resort and another claimant has an interest in only one of them, the last claimant may compel the former to exhaust the fund to which the second cannot resort before coming upon the one available to both. *Cheesebrough* v. *Millard*, 1 Johns. Ch. 409. *Carter* v. *Tanners Leather Co.* 196 Mass. 163, 166. *Lewis* v. *United*

States, 92 U. S. 618, 623. In the absence of some special equity a court of equity will not entertain the question of the marshalling of assets unless both funds are in the jurisdiction and control of the court. *Lewis* v. *United States*, *supra*.

Rice v. *Harbeson*, 63 N. Y. 493, *Willey* v. *St. Charles Hotel Co.* 52 La. Ann. 1581, *Anonymous*, 9 Mod. 66, *Bowaman* v. *Reeve*, Prec. Ch. 577, *Peters* v. *Erving*, 3 Bro. C. C. 54, and *Wright* v. *Nutt*, 3 Bro. C. C. 326, all cited by the plaintiff, are cases where foreign creditors with a fund available at their own domicil unsuccessfully sought to share a local fund with creditors resident at the domicil of the debtor, and, indirectly, are authority for the rule established in this Commonwealth that a Massachusetts creditor may collect his debt out of the assets within the Commonwealth regardless of the question whether the administration of the estate be a principal or ancillary administration. *Newell* v. *Peaslee*, 151 Mass. 601. *Cowden* v. *Jacobson*, 165 Mass. 240. *Rackemann* v. *Taylor*, 204 Mass. 394, 397. *Putnam* v. *Middleborough*, 209 Mass. 456, 457.

The real estate in England is not in the possession or control of the executors of the will in this Commonwealth; the executors are not accountable for it here, and they are bound to administer it under the direction of the court which appointed them. *Putnam* v. *Middleborough*, *supra*.

There are no facts in the bill alleged, or from which it can be inferred, that the courts of England in the ancillary administration of the estate would not direct the Massachusetts creditor to resort to the Massachusetts fund or that it would not order the real estate to be sold and distributed under its direction to the legatees named in the will in conformity to the expressed desire of the testator. *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461. *Pepin* v. *Bruyere*, [1900] 2 Ch. 504. *Duncan* v. *Lawson*, 41 Ch. D. 394. *Murray* v. *Champernowne*, [1901] 2 Ir. R. 232.

Moreover, a creditor who can hold two funds is not required to address himself first to that one which he alone can claim, when to do so would result in unreasonable delay and inconvenience or would involve litigation in the collection of his debt. *Farwell* v. *Bigelow*, 112 Mich. 285, 289, and cases collected in *Carter* v. *Tanners Leather Co.* 196 Mass. 163 at page 168. In any event the creditor in the case at bar might well be put to litigation as between

himself and the legatees, and materially delayed in obtaining his payment.

It follows that the bill does not state a case for relief and the entry must be, bill dismissed with costs.

So ordered.

FRANCIS L. GARDNER & another *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Bristol. October 22, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Evidence, Circumstantial.

In an action by the owner of a pasture adjoining a railroad location against the railroad corporation owning such adjoining land for the alleged poisoning of heifers belonging to the plaintiff, it appeared that the heifers were found dead, that on the plaintiff's land near the division fence between the plaintiff's land and that of the defendant were found various articles of rubbish, some of which might be inferred to have come from the station or freight house of the defendant and some of which obviously did not, and that in the bushes nineteen feet from the division fence was found a wooden keg open at the top, which contained a small quantity of a loose white powder. The plaintiff contended that this was arsenate of lead, a poison. It was assumed, for the purposes of decision, that on all the evidence the jury could have found that this white powder was arsenate of lead and that the plaintiff's heifers were poisoned by it. *Held*, that, with this assumption, there was nothing to show that the keg belonged to the defendant or ever had been in its possession or on its premises or in the possession of any of its employees, that the plaintiff had failed to show by any direct evidence or by any reasonable inference from established facts that the keg containing poison was placed in the pasture by any negligence or wrongful act for which the defendant was responsible and that a verdict rightly was ordered for the defendant.

TORT, the declaration alleging that the plaintiffs owned pasture land in Swansea which they used for pasturing cows and which adjoined premises owned and occupied by the defendant, that without the knowledge of the plaintiffs the defendant by its agents and employees negligently and wrongfully threw upon such pasture land of the plaintiffs poisonous substances whereby three heifers belonging to the plaintiffs were poisoned and caused to die. Writ dated October 26, 1914.

In the Superior Court the case was tried before *Morton*, J. At the close of the plaintiffs' evidence, which is described in the opinion, the judge ordered a verdict for the defendant and reported the case for determination by this court, with a stipulation of the parties that, if the ordering of the verdict was wrong, judgment was to be entered for the plaintiffs in the sum of $500; and that otherwise the verdict, as ordered, was to stand.

L. E. Wood, for the plaintiffs.

A. W. Blackman, for the defendant.

De Courcy, J. This action of tort was brought to recover from the defendant for the loss of three heifers. The contention of the plaintiffs is, that the cattle were poisoned by eating arsenate of lead, alleged to have been negligently and wrongfully placed on the plaintiffs' pasture land by agents and employees of the defendant.

The station lot of the defendant in the town of Swansea was bounded on the south by the railroad right of way, on the west by Gardners Neck road, and on the north and east by the pasture lot of the plaintiffs. In the latter part of August, 1914, two heifers, which the plaintiffs pastured in this lot, were found dead, and the third was removed but died later. One of the plaintiffs, on looking over the pasture, found near the division fence various articles of rubbish, such as paint and tomato cans, pails, rope, trolley poles, broken crockery and pieces of black board. In the bushes nineteen feet east of the fence he found a wooden keg, which was open at the top, and contained a small quantity of what appeared like loose white powder.

Assuming in favor of the plaintiffs that on all the evidence the jury could find that this white powder was arsenate of lead, and that the cattle were poisoned by it, the burden was on them to go further and show that the poison was deposited in their pasture by some one for whose action the defendant was legally liable. There was no evidence that said keg belonged to the defendant, or ever was on its premises, or in the possession of any of its employees. One Sheehan had left a keg and other apparatus used for spraying trees, at the station in 1910; but so far as appears it was shipped to Providence by freight or express, as he directed. While it might be inferred that some of the rubbish found in the pasture came from the station or freight house, obviously some of it had not been

in the possession of the defendant; and besides the keg was found at another spot. Not only was there no evidence that any employee of the defendant put the keg in the pasture, but there was an equal opportunity to do so by the numerous persons who came in vehicles to the station or freight house or post office, or drove into the freight yard by the way adjoining the pasture. In short, the plaintiffs failed to show either by direct evidence or by reasonable inference from established facts, that the keg containing poison was placed in the pasture by any negligence or wrongful act for which the defendant is responsible. On the evidence we are left wholly to conjecture and surmise to determine where the keg came from, or how it got where it was found. *Bigwood* v. *Boston & Northern Street Railway*, 209 Mass. 345. See also *McCulloch* v. *Needham*, 217 Mass. 227; *Lyford* v. *Boston & Maine Railroad*, 227 Mass. 10.

In accordance with the report, the verdict for the defendant is to stand, and it is

So ordered.

COMMONWEALTH *vs.* DAVID H. AHERN.

Middlesex. November 7, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Intoxicating Liquors. Evidence, Circumstantial. *Pleading, Criminal,* Indictment.

At the trial of a complaint under R. L. c. 100, § 1, for unlawfully keeping for sale intoxicating liquors with intent unlawfully to sell the same, there was evidence that the defendant, who was a wage earner, had in his house a half barrel of sterling ale, in which there was a faucet, and an empty barrel that had contained ale, also thirty-two packages each of which contained sixteen half pint bottles of whiskey, and that no empty bottles were found about the premises. *Held*, that on this evidence the presiding judge rightly refused to order an acquittal or to rule that the defendant was entitled to an acquittal.

On a complaint under R. L. c. 100, § 1, charging that the defendant "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same," the defendant can be convicted on proof of keeping with intent to sell unlawfully without any evidence of exposing liquors for sale.

COMPLAINT, received and sworn to in the Fourth District Court of Eastern Middlesex on September 15, 1916, under R. L. c. 100,

§ 1, charging that the defendant at Woburn on September 13, 1916, "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth, . . . not having . . . any license, authority, or appointment, according to law, . . . to expose, keep for sale, or sell said liquors."

In the Superior Court the defendant was tried before *Stevens*, J. The evidence for the Commonwealth is described in the opinion. The defendant offered no evidence and asked the judge to order a verdict of not guilty. This the judge refused to do. The defendant then asked the judge to make five rulings, of which the judge made the second and fourth and also the fifth with a certain modification. The others were as follows:

"1. On all the evidence in the case, the defendant is entitled to an acquittal."

"3. There is no evidence in this case that the defendant illegally exposed any liquors for sale."

The judge refused to make either of these rulings and submitted the case to the jury in the manner described in the opinion. The jury returned a verdict of guilty; and the defendant alleged exceptions.

The case was submitted on briefs.

E. M. Sullivan, for the defendant.

N. A. Tufts, District Attorney, *& G. S. Harvey*, Assistant District Attorney, for the Commonwealth.

BRALEY, J. The offence of keeping intoxicating liquors for unlawful sale may be established without evidence of either a sale or an attempt to sell. *Commonwealth* v. *Tay*, 146 Mass. 146. And, evidence having been introduced from which the jury could find that the defendant wage earner had in his house a half barrel of sterling ale in which there was a faucet and an empty barrel which had contained ale and thirty-two packages, each of which contained sixteen half pint bottles of whiskey, and that no empty bottles were to be found about the premises, the judge rightly declined to order a verdict for the defendant or to direct an acquittal. *Commonwealth* v. *Dolan*, 121 Mass. 374. *Commonwealth* v. *Atkins*, 136 Mass. 160.

The instructions, which in substance embodied all the defendant's requests except the first and third, carefully and sufficiently guarded the defendant's rights, and the jury must have been satis-

fied that the defendant kept the liquors with the intent of making illegal sales. *Commonwealth* v. *Martin*, 162 Mass. 402. The judge for reasons previously stated could not have given the first request that on all the evidence the defendant was entitled to an acquittal.

The third request, that there is no evidence that the defendant illegally exposed any liquors for sale, also was inappropriate. While the R. L. c. 100, § 1, makes it a criminal offence for any person to sell or expose or keep for sale spirituous or intoxicating liquors unless duly licensed, and the complaint charges that the defendant "did expose and keep for sale intoxicating liquors," proof of keeping with intent to sell was sufficient to sustain a conviction. *Commonwealth* v. *Atkins*, 136 Mass. 160.

Exceptions overruled.

SUMNER P. WILLARD *vs.* CLIFTON G. GREENWOOD & another.

Middlesex. November 15, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Bills and Notes, Consideration. *Husband and Wife*. *Practice, Civil*, Rulings, Memorandum of decision.

In an action against a husband and wife jointly on a promissory note signed by both of them as makers, where it appears that the wife signed the note as a joint and several maker with full knowledge of its tenor and that the note was given for money lent by the plaintiff to the husband to be secured by a mortgage of the husband's real estate, a good consideration for the wife's promise is shown.

A judge before whom a case is tried without a jury properly may refuse to make a ruling correct in law if it is not applicable to the facts of the case as found by him on evidence warranting such findings.

If a judge, before whom an action at law has been tried without a jury and who has been asked to make certain rulings of law, takes the case under advisement and does not deal with the requests for rulings until some time later when he files a memorandum of decision with a finding against the party who made the requests, there is no error of law in this if the party whose requests for rulings have been refused is allowed to except to the refusal.

CONTRACT against a husband and wife jointly on a promissory note secured by a mortgage of real estate owned by the husband. Writ dated July 30, 1915.

In the Superior Court the case was tried before *Irwin*, J., without a jury. The defendant Clifton G. Greenwood made no defence

to the action and was defaulted. The defendant Carrie M. Greenwood contested the case and contended among other things that no consideration for the note was received by her and that she was not in a condition physically or mentally to sign the note at the time it was executed. The facts that could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant Carrie M. Greenwood asked the judge to make the following rulings:

"1. On all the evidence the plaintiff cannot recover against the defendant Carrie M. Greenwood.

"2. If the note was received by the plaintiff to strengthen the purpose of the husband, Clifton G. Greenwood, to meet his moral obligation to the plaintiff, the defendant Carrie M. Greenwood is not liable.

"3. A wife's note given as security for a debt of her husband, previously existing, is not a valid consideration, neither is a wife's note to a third person on payment of her husband's debt for a valuable consideration unless she delivered the note to her husband to use by him.

"4. If the wife obtains nothing and the plaintiff gave nothing to her, there is no consideration moving from the defendant Carrie M. Greenwood to the plaintiff and the defendant Carrie M. Greenwood would not be liable.

"5. The defendant Carrie M. Greenwood was not an accommodation maker under R. L. c. 73, § 42.

"6. The defendant Carrie M. Greenwood having denied the consideration for the note, the burden of proof is on the plaintiff."

"The court, after taking the matter under consideration for about two weeks, found for the plaintiff (after the defendant Clifton G. Greenwood had been defaulted) in the sum of $1,354.22, but the court did not make any other finding or ruling in writing on the defendant's above requests for rulings until February 19, 1917, when the court in conference with counsel stated that he refused the first request and, thereupon, the court made the following memorandum with reference to said other requests for rulings:

"With the exception of the first request, the above several requests were considered and applied in so far as they relate to the facts laid before the court during the hearing of the case."

The defendant Carrie M. Greenwood excepted to the judge's refusal to make the rulings requested by her. She further excepted to the judge's refusal of the first request and to the making of the memorandum of his rulings on February 19, 1917, and also excepted to the refusals to rule and the rulings made as set forth in the memorandum.

R. L. c. 153, § 2, is as follows: "A married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, except that she shall not be authorized hereby to make contracts with her husband."

R. L. c. 73, § 41, is as follows: "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

J. J. Shaughnessy, for the defendant Carrie M. Greenwood.

J. W. McDonald, for the plaintiff, was not called upon.

BRALEY, J. The judge before whom this case was tried without a jury having been warranted in finding on the record, that the defendant Carrie M. Greenwood signed the promissory note in suit as a joint and several maker with full knowledge of its tenor and that the consideration therefor was money lent by the plaintiff to her husband to be secured by a mortgage on his real estate, properly refused all the defendants' requests. R. L. c. 153, § 2; c. 73, § 41. *Harvey* v. *Squire*, 217 Mass. 411, 414. *Hooper* v. *Cuneo*, 227 Mass. 37, 40.

Nor do we discover any error of law because the memorandum or decision of the judge was not communicated or announced to counsel until some time after the case had been reserved for consideration.

Exceptions overruled.

WALTER G. BURNS & another *vs.* CAROLYN A. THORNDIKE.

Suffolk. November 16, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Building contracts, In writing. *Waiver.*

Where a building contract in writing contains a provision that "If any extra work is required, a price for the same must be agreed upon and approved in writing by the architect before such work is begun," the architect has no authority to waive the condition precedent of his approval in writing or to bind the owner by any oral order, and the contractor cannot recover from the owner for extra work and disbursements merely agreed to and approved by the architect orally.

CONTRACT upon an account annexed for a balance of $150 alleged to be due for the construction of a building at the corner of North Russell Street and Cambridge Street in Boston for the contract price of $23,500 with the following extras: Bond $63, Painting roof fences $15, Waterproofing basement $100, Plate glass insurance $14.33 and Fireproofing hall floors $30. Certain allowances and payments on account made the balance alleged to be due for the contract price and extras $150. Writ in the Municipal Court of the City of Boston dated May 13, 1915.

At the trial there was evidence tending to show that the plaintiffs and the defendant on June 10, 1914, entered into a contract in writing by which the plaintiffs agreed to provide all materials and perform all work for the erection of a certain building for the sum of $23,500 as shown on the drawings and provided in the specifications prepared by William G. Rantoul, architect. It was provided that the drawings and specifications should become a part of the contract.

Article II of the contract contained the following clause: "It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final."

The specifications contained, among others, the following clauses:

"The contractor, at his own expense, shall protect the owner by approved Surety Company's bond for the amount of the contract.

"In case of a discrepancy in figures, drawings or specifications, the matter is to be submitted to the Architect for adjustment.

"These specifications are not to be construed as a complete schedule of the work to be done, but all materials or labor called for or implied by either of them, or by the drawings, or required to make a complete or workmanlike job, in the opinion of the Architect, must be furnished or done the same as if here specified in detail.

"The General Contractor is to employ George H. Wetherbee, Engineer, 12 West St., Boston, to establish the lot lines and grades and the General Contractor is to follow these lines.

"If any extra work is required, a price for the same must be agreed upon and approved in writing by the Architect before such work is begun."

There was evidence tending to show that the plaintiffs provided all materials and performed all work for the erection of the building; that, when the plaintiffs submitted their figures for the erection of the building, the premium for the Surety Company's bond, provided for above, was $125; that the figures were not accepted and the contract executed until two or three months thereafter, and in the interim the premium for a Surety Company's bond had been raised to $188; that the architect directed the plaintiffs to charge the difference of $63 as an extra, and the premium of $188 was paid by the plaintiffs; that the painting of the roof fences was an extra, and the price of $15 for painting them was agreed upon orally between the plaintiffs and the architect, after which the plaintiffs painted the fences at the direction of the architect and charged it as an extra, that the architect asked the plaintiffs what they would charge to cover the entire basement floor with a layer of tar paper mopped in hot tar and over this put six inches of concrete composed of cement and gravel, that the plaintiffs said $100 and the architect told them to go ahead and do it and charge it as an extra, that the plaintiffs thereupon did it and that this was the item of extras called "Waterproofing basement;" that the architect orally directed the plaintiffs to insure the plate glass in the building and charge it as an extra, and the plaintiffs did insure the plate glass and paid the premium of $14.33 and charged the amount as an extra; that the architect asked the plaintiffs what they would charge to fireproof the hall floors, and the plaintiffs said $30 and the architect told them to go ahead and

do it and charge it as an extra, and the plaintiffs did it and charged it as an extra.

The judge of the Municipal Court found that the plaintiffs made the payments and performed the work described above, which were agreed upon orally and were approved orally by the architect.

The judge made the following statement of his decision: "But for the rule of law laid down in *Stuart* v. *Cambridge*, 125 Mass. 102, and supporting cases as to lack of power by the architect to waive a requirement in the specifications that the price for any extra work must be agreed upon and approved in writing by the architect before such work is begun, and for the fact that the failure of the architect to so approve in writing the prices for the extra work mentioned in this report was not personally waived or ratified by the defendant, I should have found for the plaintiffs for the amount claimed less two deductions, one of $2 for the cavity in the stair well in the basement and another of $2 for the fact that certain risers on the stairs projected above the stair floors, that is to say in the sum of $146."

The judge found for the defendant, and at the request of the plaintiffs reported the case to the Appellate Division. The Appellate Division made an order that the report be dismissed; and the plaintiffs appealed.

W. H. Thorpe, for the plaintiffs, submitted a brief.

W. B. Grant, for the defendant.

BRALEY, J. By the terms of the contract: "If any extra work is required, a price for the same must be agreed upon and approved in writing by the architect before such work is begun." It was not within the authority of the architect to waive this provision, and although he orally approved all extra work and the disbursements for which recovery is sought, the defendant never has waived the contract nor ratified his acts.

It follows that the plaintiffs cannot recover. *Stuart* v. *Cambridge*, 125 Mass. 102.

Order dismissing the report affirmed.

JEREMIAH MAHONEY'S (dependent's) CASE.

Suffolk. November 19, 1917. — November 27, 1917.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Dependency. *Words*, "Family."

Where, in a claim under the workmen's compensation act by an alleged dependent of a deceased employee, it appears that the employee, who had a minor daughter, lived with his sister and her minor son in a house that formerly had belonged to their mother, who had died intestate, that the sister had the exclusive management of the household affairs and that "nothing was ever said about board" but that weekly payments of the employee contributed toward the support of the household whenever he could obtain employment, and that he also purchased some incidental household furnishings and supplies besides cultivating the garden, it cannot be found that the employee's sister, who was not his next of kin, was a member of his family so as to come within the definition of "Dependents" contained in St. 1911, c. 751, Part V, § 2.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board, in which they found that the claimant, Agnes M. Murphy, the sister of the deceased injured employee, was a member of the employee's family, although not his next of kin, and that she was partially dependent upon him for support, and made her an award of compensation as such dependent.

In the Superior Court the case was heard by *Jenney*, J. The facts shown by the report are stated in the opinion. The judge made a decree in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

The definition of dependents contained in St. 1911, c. 751, Part V, § 2, is as follows: "'Dependents' shall mean members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury."

The case was submitted on briefs.

H. S. Avery, for the insurer.

M. F. Connelly, for the claimant.

BRALEY, J. We are of opinion that the decree for the claimant must be reversed, and a decree for the insurer entered. The de-

ceased employee having left a minor daughter, the claimant, his sister, is not the next of kin and can have no claim for compensation unless she was a member of his family partly dependent for support upon his earnings at the time of his death. *Kelley's Case*, 222 Mass. 538. St. 1911, c. 751, Part V, § 2.

While the claimant, her minor son and the employee lived together in the house formerly owned by the mother of the sister and brother, who died intestate, the claimant is shown to have had the exclusive management of the household affairs. And she and her son undoubtedly constituted a "family." *Murphy's Case*, 224 Mass. 592. It is uncontroverted that "nothing was ever said about board." But even so, it is plain on the record that the weekly payments of the employee contributed toward the support of the household whenever he could obtain employment, and the purchase of some incidental household furnishings and supplies as well as his cultivation of the garden did not make him the head of a family of which his sister and his nephew could be deemed members. *Cowden's Case*, 225 Mass. 66.

Ordered accordingly.

SOCIETE DE BIENFAISANCE ST. JEAN BAPTISTE DE MILLBURY *vs.* WORCESTER COUNTY INSTITUTION FOR SAVINGS.

SAME *vs.* PEOPLE'S SAVINGS BANK.

Worcester. October 1, 1917. — November 30, 1917.

Present: BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Savings Bank. Contract, Construction. *Bills and Notes*, Payment on forged order. *Pleading, Civil*, Equitable defence, Set-off.

Where a depositor in a savings bank assents at the time of his first deposit, in accordance with a notice printed on his bank book, "to all the regulations of the institution," this does not incorporate in his contract with the bank a by-law subsequently adopted, without the knowledge of the depositor, that, "When a deposit book has been lost or destroyed, immediate written notice should be given to the treasurer . . . the corporation will not be responsible for loss sustained, when a depositor has not given notice in writing of his book having been stolen or lost, if payment be made in whole or in part on account of such book on presentation."

A depositor in a savings bank is not bound by a by-law of the bank, passed without his knowledge about four years after the contract of deposit was made, that "Any payment made to any person who presents a deposit book of this bank,

or who shall present an order for the payment of money accompanied with such deposit book purporting to have been signed by the person to whom such book belongs, shall be deemed to be for the Bank as good and effectual a payment as that made to the owner of such deposit book."

In an action by a fraternal beneficiary corporation against a savings bank for the amount of deposits drawn out by the plaintiff's treasurer upon forged orders, remissness of the plaintiff's auditors, in failing to discover by semiannual or quarterly examinations of the treasurer's accounts that the treasurer was misappropriating the funds of the corporation or was obtaining money from the savings bank on forged orders, is not evidence that the corporation participated in the treasurer's fraud, and does not require a finding that the corporation was so negligent in failing to discover the fraud as to lose its right to recover the amount paid by the bank on the forged orders.

In the case stated above the defendant relied, as an equitable defence under R. L. c. 173, § 28, on the facts that the plaintiff's dishonest treasurer, who drew $3,345 on forged orders out of the savings bank, used for himself only $250 and deposited the remaining $3,095 in the plaintiff's name and to its credit in a national bank, and that the money thus deposited was used in paying sick benefits and other legal obligations of the plaintiff. The plaintiff never offered to return any part of the deposit to the defendant savings bank. The judge who heard the case ruled that the plaintiff could recover only $250. *Held*, that the ruling was right.

In the case described above the plaintiff did not demur to the equitable defence on the ground that the remedy at law was plain and adequate, and it was *said* that it was unnecessary to consider whether the defendant could have recovered under a declaration in set-off for money had and received.

TWO ACTIONS OF CONTRACT by a fraternal beneficiary corporation, each brought against a savings bank for the amount of a deposit and dividends. Writs dated respectively July 29 and September 7, 1915.

In the Superior Court the two cases were tried together before *Sanderson*, J., without a jury. The evidence in each of the cases is described in the opinion. At the close of the evidence in each case the defendant asked the judge to order a verdict for it. This the judge refused to do. The defendant in the first case then asked for twenty-three rulings and a supplemental ruling, and the defendant in the second case asked for substantially the same rulings and also for two others numbered twenty-four and twenty-five. The judge in both of the cases made certain of the rulings requested. The others were as follows:

"10. The direction 'Pay Treasurer, etc.,' on the plaintiff's pass book did not forbid nor prevent the defendant paying the deposit or any part thereof to the plaintiff itself without such order or upon a forged or invalid order or render it liable thereby."

"12. If the direction 'Pay Treasurer, etc.,' constituted a term of the contract between the plaintiff and the defendant, so that a payment could not be made to the plaintiff or to its use otherwise than in compliance with such direction, then upon all the evidence the defendant had reason to believe that the orders furnished it were valid or had been ratified, and the plaintiff is estopped to hold the defendant liable in this action.

"13. It was the duty of the plaintiff to furnish the defendant with the true signatures of its president, financial secretary and recording secretary for the time being and with a facsimile of its seal, and if it failed so to do, the defendant is not responsible for any loss thereby occasioned.

"14. A corporate seal is ordinarily in the custody of the secretary and the defendant bank was not guilty of negligence in honoring an order bearing the corporate seal, attested by what purported to be the signature of the recording secretary, when such order was presented by one who was not such secretary.

"15. The defendant had the right to assume that the plaintiff's corporate seal was in the custody of its proper officer and by him placed on orders presented to the defendant and the defendant had the right to honor an order bearing the impression of the corporate seal upon it, and is not guilty of negligence in so doing, even if the signature to such order were forged."

"19. There is no evidence tending to show that the defendant failed to use due diligence in making the payments in question.

"20. The defendant is not responsible if a criminal act of the plaintiff's agent caused loss to the plaintiff.

"21. If it shall appear that by proper audit or otherwise the plaintiff could have discovered the drafts made by its agent on the defendant bank and it failed so to discover them, the defendant is not responsible.

"22. The plaintiff is guilty of such negligence as bars it from recovery.

"23. The plaintiff is bound by the by-laws of the defendant bank existing at the time of its first deposit and any changes thereafter made thereto.

"24. The defendant had a right to assume that the signatures on the signature card presented to it by the plaintiff's treasurer were genuine.

"25. It is no evidence of negligence on the part of the defendant if it relied on the signature card presented by the defendant's treasurer purporting to bear the signatures of the proper officers and an impression of its seal, even if said signatures were not genuine and were forged."

The judge refused to make any of the rulings quoted above, and the defendant in each case excepted.

The judge ruled in substance that the plaintiff could not recover for so much as was paid to the treasurer, either in checks or in cash, which the treasurer deposited to the plaintiff's account in the Millbury National Bank, but that it could recover for so much as was paid to the treasurer in cash which he did not deposit to the account of the plaintiff in the national bank and which he misappropriated. The plaintiff excepted in each case to so much of the judge's ruling as stated that the defendant was not liable for the money withdrawn by the treasurer which he deposited to the account of the plaintiff in the national bank.

The judge found for the plaintiff in each of the cases, in the first case in the sum of $78.53 and in the second case in the sum of $246.41. In each of the cases the plaintiff and the defendant both alleged exceptions.

G. S. Taft, for the plaintiff.

G. A. Gaskill, for the defendants.

BRALEY, J. The rights of the parties apart from the equitable defence depend on the terms of the contracts that were made, as shown by the record, when the accounts were opened. *Wall* v. *Provident Institution for Savings*, 6 Allen, 320. *Wallace* v. *Lowell Institution for Savings*, 7 Gray, 134, 137. *White* v. *Franklin Bank*, 22 Pick. 181. *Heath* v. *New Bedford Safe Deposit & Trust Co.* 184 Mass. 481, 483.

In the first case it is unnecessary to decide whether the bank would have been exonerated if article one of the by-laws had been inserted in the contract, that, "When any money is withdrawn, the book given to the depositor must be brought to the Bank to have the amount entered therein. If the book has been lost or destroyed, written notice must be given to the Treasurer, and if the loss shall be proved to the satisfaction of the Board of Investment, they may direct the account to be paid without the book; but the Institution will not be responsible for loss sustained if payment is made on

presentation of the book with a spurious order, if such notice has not been given and received," for the by-law as printed in the deposit book reads, "When a book is lost, the owner thereof must give immediate notice to the treasurer, otherwise the institution will not be responsible if the money should be paid upon a forged order accompanied by the book." *Goldrick* v. *Bristol County Savings Bank*, 123 Mass. 320. *Donlan* v. *Provident Institution for Savings*, 127 Mass. 183, 185. Nor did the plaintiff's written assent by its treasurer at the time of deposit, "to all the regulations of the Institution," read into the contract the by-law subsequently enacted, of which the plaintiff had no knowledge, that "When a deposit book has been lost or destroyed, immediate written notice should be given to the Treasurer. As the officers of the Institution may be unable to identify every depositor, the Corporation will not be responsible for loss sustained, when a depositor has not given notice in writing of his book having been stolen or lost, if payment be made in whole or in part on account of such book on presentation. In all cases, a payment upon presentation of a deposit book shall be a full and complete discharge to the Corporation for the amount so paid." *Kimins* v. *Boston Five Cents Savings Bank*, 141 Mass. 33. *Hudson* v. *Roxbury Institution for Savings*, 176 Mass. 522. It is plain that, independently of the finding that the defendant had been negligent, the bank is responsible for the payments made on the forged orders of the plaintiff's treasurer, even if when the payments were made the deposit book was presented. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87. *Kingsley* v. *Whitman Savings Bank*, 182 Mass. 252, 254.

What has been said also disposes of the defence urged in the second case, where the contract and deposit were made on July 6, 1898, and the by-law that, "Any payment made to any person who presents a deposit book of this Bank, or who shall present an order for the payment of money accompanied with such deposit book purporting to have been signed by the person to whom such book belongs, shall be deemed to be for the Bank as good and effectual a payment as that made to the owner of such deposit book," was passed on February 4, 1903, by which the plaintiff, who had no knowledge of it was not bound, and the original contract remained unaffected.

It is further contended, that the plaintiff is estopped by its neg-

ligent failure to discover the treasurer's peculations. Doubtless the plaintiff is charged with knowledge of the entries in its books of account. *Allen* v. *Puritan Trust Co.* 211 Mass. 409, 420. The plaintiff's auditors, however, who either semiannually or quarterly examined the treasurer's accounts, did not discover that the treasurer was misappropriating the funds or obtaining money from the defendants on forged orders until after July 15, 1914, although, if they "had made a reasonably careful examination of the treasurer's accounts, and had made an investigation to determine the amount on deposit in the defendant bank, they would have discovered at each examination after November 6, 1912, that the treasurer was withdrawing money without authority."

But the judge found generally for the plaintiff. The remissness of the auditors is not evidence of the plaintiff's participation in the treasurer's fraud, and as matter of law it furnishes no justification to the defendants to deprive the plaintiff of its property through honoring forged orders. *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Mass. 268, 281.

But, if the defence of payment and of estoppel fall away, the defendants also severally answered, that it would be inequitable to permit the plaintiff to recover, and that they should be absolutely and unconditionally relieved from the respective claims. R. L. c. 173, § 28. And, no question having been raised as to whether an equitable defence had been pleaded properly, the presiding judge ruled that the plaintiff's demands should be reduced proportionally, to which rulings the plaintiff excepted. The forged orders on both banks aggregated $3,345, of which the defaulting treasurer used or appropriated $250, the remaining $3,095 was deposited by him in the plaintiff's name and to its credit in the Millbury National Bank. The judge found and ruled that of the total amount the plaintiff could recover only $250. The method by which the embezzlement was accomplished is described as follows: "Bazinet embezzled from the plaintiff money which he collected from members and other income of the society to an amount at least equal to the sums which he withdrew from the defendant bank. The sums thus collected and embezzled were not deposited to the credit of the society. By using the money withdrawn from the defendant bank to pay the obligations of the plaintiff, Bazinet was enabled to postpone the time when his embezzlements would be

discovered." It was decided in *Barton* v. *Radclyffe*, 149 Mass. 275, that to maintain an equitable defence under the statute, "such defence must be one within the rules and principles of equity jurisprudence." While in the beginning the treasurer alone knew of the transactions, the defendants upon discovery of the fraud could have maintained an action to recover back the money from the plaintiff, who constructively, if not actually, came into possession when the deposits were made in the national bank in its name from which from time to time sick benefits and other legal obligations of the plaintiff were satisfied. *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Mass. 268, 272-274. *Foote* v. *Cotting*, 195 Mass. 55, 61, 62. Accordingly the money of the defendants to the extent shown by the record not only has gone in satisfaction of the plaintiff's legitimate pecuniary obligations, but, upon its discovery of the source from which the funds had been obtained, no offer of restitution ever was made. Or, if otherwise put, the defendants under the contracts owe the amount of the deposits with interest. But the plaintiff already has received and appropriated to its own use moneys of the defendants nearly equal to the deposits.

It is unnecessary to determine whether the defendants could have pleaded in set-off for money had and received. See *Foote* v. *Cotting*, 195 Mass. 55, 63. The plaintiff did not demur to the equitable defence, that the remedy at law was plain and adequate, and it is plain that the defendants could have maintained a bill for an accounting in which relief could have been given by a money decree. *Newell* v. *Hadley*, 206 Mass. 335. *Bremer* v. *Williams*, 210 Mass. 256. The defendants therefore can avail themselves of this defence, under which a double amercement is averted, with full satisfaction of the plaintiff's contractual demands. We have examined all of the alleged errors, and, finding no grounds for reversal, the exceptions of each party should be overruled.

So ordered.

MORGAN J. McSWEENEY, administrator, *vs.* EDISON ELECTRIC ILLUMINATING COMPANY.

Suffolk. October 17, 1917. — December 4, 1917.

Present: RUGG, C. J., BRALEY, PIERCE, & CARROLL, JJ.

Evidence, Declarations of deceased persons.

At a trial where a declaration of a deceased person is offered in evidence under R. L. c. 175, § 66, it is right for the presiding judge to refuse to leave to the jury the preliminary questions determining whether the evidence is to be received, the statute making it the duty of the judge to decide those questions, leaving to the jury, if the evidence is admitted, its credibility and the weight to be attached to it.

TORT by the administrator of the estate of Archie L. King, late of Danvers, for causing the conscious suffering and death of the plaintiff's intestate on October 18, 1914, by knocking him down with a motor car alleged to have been operated negligently by a servant of the defendant. Writ dated May 7, 1915.

In the Superior Court the case was tried before *Hitchcock*, J. In the course of the trial certain declarations of the intestate in regard to the way in which the accident happened were offered in evidence and were admitted by the judge. The defendant asked the judge to make the ruling which is quoted in the opinion. The judge refused to make the ruling requested and instructed the jury that from the fact that the evidence had been received they might understand that the judge had decided that the statements were made in good faith and before the action was commenced and that they were made upon the personal knowledge of the declarant. He called the attention of the jury to the fact that the statements were not made under oath or subject to cross-examination and told them that it did not follow because the evidence was admitted that it had to be believed and that it was for them to give the evidence such weight as they thought it entitled to have.

The jury returned a verdict for the plaintiff and assessed the damages in the sum of $750 for conscious suffering and in the sum

of $2,500 for causing death. The defendant alleged exceptions to the judge's refusal to make the ruling requested by it.

The case was submitted on briefs.

E. C. Stone, for the defendant.

M. J. McSweeney, W. H. McSweeney & F. H. Caskin, Jr., for the plaintiff.

CARROLL, J. This is an action to recover damages for the conscious suffering and death of the plaintiff's intestate, Archie L. King. At the trial witnesses testified to certain declarations made by him. The jury found for the plaintiff.

The defendant requested the presiding judge to rule: "Before the jury is justified in receiving any declaration or statement which King is said to have made, it must be satisfied that (1) King made the statement testified to by the witness who appears in court; (2) King made the statement to the witness in good faith; and (3) King himself knew of his own knowledge what the witness testified that King said."

Under R. L. c. 175, § 66, the admissibility of a declaration of a deceased person is for the presiding judge to pass upon. The language of the statute being "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." The preliminary question, whether the evidence is to be received or rejected, must be decided by the presiding judge in the first instance. The reception of the evidence is for him; its credibility is for the jury. As we construe the ruling requested by the defendant it called upon the judge to say to the jury that the admissibility or reception of the evidence was a matter for their decision. For this reason the requests properly were refused.

When the declaration of a deceased person is offered in evidence the judge passes on the preliminary question: he decides whether it is admissible or not. If satisfied that the conditions of the statute were complied with, it is his duty to admit it; if not so satisfied, it is his duty to exclude it; and his conclusions of fact are not reviewable unless clearly wrong. *Dixon* v. *New England Railroad*, 179 Mass. 242, 246. *Flynn* v. *Coolidge*, 188 Mass. 214. *Dickinson* v. *Boston*, 188 Mass. 595. *Glidden* v. *United States Fidelity & Guaranty Co.* 198 Mass. 109, 114. *Carroll* v. *Boston*

Elevated Railway, 210 Mass. 500. *Johnson* v. *Foster*, 221 Mass. 248.

A discretionary method of procedure which may be followed in passing upon the preliminary question is pointed out in *Slotofski* v. *Boston Elevated Railway*, 215 Mass. 318, 320.

Exceptions overruled.

CORNELIUS D. MURPHY *vs.* MARGARET J. MOORE, administratrix, & another.

Bristol. October 22, 1917. — December 4, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Master's report: objections and exceptions. *Rules of Court*. *Equity Jurisdiction*, Plaintiff must come into court with clean hands. *Wrongdoer without Remedy*.

If a party to a suit in equity, after a master to whom the case was referred has notified the counsel of the time and place to attend and hear a draft copy of his report, has failed to comply with Equity Rule 31 of the Superior Court requiring objections to the report to be filed in writing within five days, he has lost his right to file exceptions, because there are no objections on which they can be based, and, if later the trial judge upon a motion of the same party extends the time for filing the master's report and under the rule exceptions need not be filed until fifteen days after the report is filed, this does not cure the failure to comply with the rule in regard to filing objections to the report and, after such failure, the filing of objections four days before the expiration of the extended time for filing the report gives the party no right to file exceptions.

In a suit in equity to obtain the discharge of a mortgage for $5,000 upon personal property, where it appears that the mortgage was given to secure the mortgagee for his liability as indorser upon certain promissory notes for $1,400 and that these notes have been paid in full, and the defendants set up a defence and a counter claim which are not established by proof, and make no allegation of fraud as against creditors, a finding in a master's report that the mortgage was made for an unnecessarily large sum and was given by the plaintiff for the purpose of deceiving and defrauding his creditors, which fraud was participated in by all the parties to the mortgage, does not make it necessary to refuse relief to the plaintiff, who has proved his right to a discharge of the mortgage without relying in any way on a fraudulent scheme against creditors and who does not seek the aid of the court in the furtherance of any such scheme.

BILL IN EQUITY, filed in the Superior Court on July 7, 1915, seeking an order for the discharge of a mortgage on the stock in

trade and fixtures of a bar room at 166 and 168 Coffin Avenue in New Bedford.

The defendants filed an answer and a cross bill as described in the opinion. The case was referred to a master who filed a report containing the findings of fact that are stated in the opinion. The facts in regard to the defendants' objections to the report, which are stated in the opinion, appeared in a certificate made by the master.

The case was heard upon the master's report by *Raymond*, J., who ordered that the exceptions to the master's report be overruled and that the report be confirmed, and made a final decree that the defendants execute and deliver forthwith to the plaintiff a discharge of the mortgage given by Cornelius D. Murphy to James F. Moore dated April 28, 1906, and that the cross bill be dismissed, and awarded costs to the plaintiff. The defendants appealed.

Equity Rule 31 of the Superior Court is as follows:

"When the master has prepared a draft copy of his report, he shall notify the parties or counsel of a time and place when and where they may attend to hear the same, and suggest such alterations, if any, as they may think proper; upon consideration whereof, the master will finally settle the draft of his report, and give notice thereof to the parties or counsel; whereupon, after perusing the same, or being furnished with a copy thereof, if they so request and pay the usual fees therefor, five days shall be allowed for bringing in written objections thereto, which objections, if any, shall be appended to the report. No exception to a master's report will be allowed without a special order of the court, unless founded upon an objection made before the master, and shown by his report, and unless filed with the clerk within fifteen days from the filing of the report. Notice of the filing of a master's report shall be forthwith sent by the clerk to each party or his counsel."

R. L. Theller, for the defendants.

E. D. Stetson, G. Geils, Jr., & E. E. Clarke, for the plaintiff, submitted a brief.

CARROLL, J. The plaintiff, in April, 1906, mortgaged for the sum of $5,000 certain personal property to James F. Moore. Moore died intestate December 27, 1908, and his widow Margaret J. Moore, the administratrix of his estate, is one of the defendants

in this suit; the other defendant, Bertha L. Moore, is his daughter. The plaintiff brings this bill for the discharge of the mortgage, contending that it was given to James F. Moore to secure his indorsement and that of Mrs. Moore on the plaintiff's promissory notes amounting to $1,400, which notes have now been paid. The defendants contend that the plaintiff and Moore were partners and that the mortgage was given to secure the interest of Moore in the partnership. They have filed a cross bill praying for a settlement of the partnership affairs.

The case was referred to a master who found there was no partnership, that the mortgage was given to secure the indorsement on promissory notes amounting to $1,400 which were paid before 1908, "that one purpose of the mortgage was to ward off possible attachments," and that the mortgage was written for an amount in excess of the liabilities to "prevent attachments by possible future creditors." The defendants filed exceptions to the master's report. A decree was entered directing the defendants to execute and deliver a discharge of the mortgage, and dismissing the defendants' cross bill.

After the master had prepared a draft copy of his report, he notified counsel of the time and place to attend and hear the same, and suggest such alterations as they thought proper. A hearing was held on October 2 and October 3, 1916, and on October 6, 1916, the master settled the draft of his report, gave notice thereof to counsel and furnished them with a copy. On October 19, more than five days after the draft of the report was settled and counsel notified, the defendants' counsel brought in the written objections thereto.

As the defendants failed to comply with Equity Rule 31, allowing five days for bringing in the objections, their exceptions are not before us. *Smedley* v. *Johnson*, 196 Mass. 316. *Ball* v. *Allen*, 216 Mass. 469. The fact that the defendants' motion of October 10 for an extension of time for filing the report was allowed and the time extended to October 23, 1916, does not help them; the report was settled October 6, and while exceptions need not, under the rule, be filed until fifteen days after the report is filed, the objections must be brought in within five days after the report is settled. This was not done and the extension of time for filing the report does not excuse the defendants.

We may add that we have considered all of the defendants' exceptions. Even if the rule were complied with and the objections were seasonably delivered to the master, the exceptions show no error of law.

The defendants' appeal from the decree brings before us the question whether the decree could be entered upon the facts found and stated in the master's report. *E. W. Burt & Co. Inc.* v. *Coes & Young Co.* 212 Mass. 134. *Ball* v. *Allen, ubi supra.* The master found that the parties entered into a fraudulent agreement; that the total indebtedness of the plaintiff was $1,400; that the notes were "short term notes" and the mortgage was given for $5,000, payable in five years; that this was done to deceive and defraud the plaintiff's creditors, and that the fraud was participated in by the parties.

The fraud referred to is not stated in the pleadings: the plaintiff does not rely on it, and the defendants do not allege it. The plaintiff was not obliged to show his own guilt in proving his case and he does not seek the aid of the court in the execution of the fraudulent scheme. In fact, the report does not show there was any direct evidence of this fraudulent purpose. The conclusion of the master may have rested entirely on inference drawn from all the facts in the case. Under these circumstances the court will not interfere of its own motion and deny the plaintiff the relief sought. See in this connection *Stillings* v. *Turner,* 153 Mass. 534; *Pierce* v. *Le Monier,* 172 Mass. 508; *Lufkin* v. *Jakeman,* 188 Mass. 528, 531, 532; *Chafee* v. *Sprague Manuf. Co.* 14 R. I. 168. See also *Downey* v. *Charles S. Gove Co.* 201 Mass. 251; *O'Brien* v. *Shea,* 208 Mass. 528.

Decree affirmed with costs.

STEPHEN C. MURCH *vs.* CHARLES G. CLAPP.

Suffolk. December 3, 1917. — December 4, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Practice, Civil, Exceptions. *Notice. Rules of Court.*

Upon the question whether under St. 1911, c. 212, § 1, and Superior Court Rules 52 and 28, the defendant in an action at law had given notice to the plaintiff of the filing of exceptions, a judge of the Superior Court found that a letter purporting to be a notice was addressed to the plaintiff's attorney at Brockton and not at his address in Boston, that the true address was in Boston, that the plaintiff's attorney had no office in Brockton and that he received no notice. There was evidence warranting this finding. *Held,* that the finding of fact must stand.

CONTRACT, by the assignee of Dora J. Hough, for $480.05 had and received to the use of the plaintiff's assignor and interest thereon. Writ dated August 23, 1916.

The defendant filed a declaration in set-off.

In the Superior Court the case was tried before *Callahan,* J., and the jury returned a verdict for the plaintiff in the sum of $375. They found for the defendant on his declaration in set-off in the sum of $23.56.

The defendant filed a bill of exceptions, and the plaintiff filed a motion to dismiss the bill of exceptions for failure on the part of the defendant's counsel to give notice of its filing to the plaintiff's counsel. The evidence at the hearing upon this motion is described in the opinion.

The judge made the following memorandum of his allowance of the motion to dismiss the bill of exceptions:

"The defendant filed a bill of exceptions on July 31, 1917, the time for filing having been duly extended to August 1, 1917. The defendant filed no substitute bill until August 13, 1917. On July 31, counsel for the defendant mailed to John D. Mulloney, Esquire, counsel for the plaintiff, a letter, addressing it to 'John D. Mulloney, Esq., Pemberton Building, Brockton, Mass.' No notice of the filing of the bill of exceptions was given; nor was any notice relating to a bill of exceptions, other than the one referred to, at any time given.

"The true address of the counsel for the plaintiff was Pemberton Building, Boston, Mass., and the plaintiff's counsel had no office in Brockton. The plaintiff's counsel stated that he had never received the notice, and I find that to be a fact.

"However, I rule as matter of law that the notice mailed by the defendant's counsel was insufficient, and that the motion to dismiss should be allowed and the bill is hereby dismissed."

The defendant alleged exceptions to the ruling of the judge allowing the motion and to the order made by him dismissing the bill of exceptions.

R. T. Anthony, for the defendant.

J. P. Barlow, (*J. D. Mulloney* with him,) for the plaintiff.

By the Court. It is required by St. 1911, c. 212, § 1, and the present Rules 52 and 28 of the Superior Court, that written notice of the filing of exceptions shall be given to the adverse party and "served by delivering the same personally to the adverse party, or his attorney, or depositing it in the post-office directed to him, at his business address, if known, postage prepaid, and an affidavit of the party making the service shall be *prima facie* proof thereof."

The defendant's bill of exceptions was filed on July 31, 1917. His attorney made affidavit to the effect that he mailed a letter directed to the plaintiff's attorney which "had not been returned to his office and that he was reasonably sure the address thereon had been changed from Pemberton Building, Brockton, Mass., to Pemberton Building, Boston, Mass. before the same had been mailed." An affidavit also was filed that no notice of the filing of the exceptions had been received by the plaintiff's attorney. The judge made a finding of fact that the letter purporting to be a notice was addressed to Brockton and not to Boston and that the true address was Boston, and that the plaintiff's attorney had no office in Brockton and that he received no notice. This finding of fact must stand. It is not unsupported by evidence. It may have been inferred rationally that the address on the letter had not been changed from Brockton to Boston. If that were so, no notice had been given as required by the Superior Court rules. The case falls within the principle of *Shawmut Commercial Paper Co.* v. *Brigham*, 209 Mass. 199, and *Chertok* v. *Dix*, 222 Mass. 226.

Exceptions overruled.

CHESTER W. DURFEE *vs.* MICHAEL J. KELLY.

Bristol. — October 22, 1917. — December 7, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Surety. Bills and Notes. Pleading, Civil, Answer. *Practice, Civil,* Amendment.

One of five sureties, who with their principal signed a promissory note as joint makers, if he pays the whole balance due on the note can maintain an action at law against one of his co-sureties to enforce contribution, and in such action can recover from the defendant one fifth of the amount paid by him.

Where in such action it appears that one of the co-sureties had died before the plaintiff paid the balance due on the note, this does not change the proportion that he can recover from the defendant.

A surety thus sued for contribution can set up the defence that he was discharged from his liability as surety, at least to the extent that he was injured thereby, by an arrangement made by the payee of the note with the principal maker without the consent or knowledge of the sureties whereby the payee gave up a part of the collateral security.

In the same case it was *held* that this defence was not open to the defendant in the present case because it was not pleaded by him.

In the same case it was *held* that, after a verdict had been ordered and had been entered for the plaintiff, the question whether the defendant should be allowed to amend his answer by setting up the defence of such a discharge from his liability as surety, which would require a new trial, was wholly within the discretion of the presiding judge, and that his refusal to allow such an amendment was final.

Where the shares in a corporation held as collateral security for the payment of a promissory note signed by sureties as well as by the principal debtor have declined in value, the failure of the payee of the note to sell the shares before the decline does not discharge the sureties, if no wrongful conduct on the part of the payee appears and the sureties have stood by and let the decline in value proceed when they might have paid the note and have received and sold the collateral security.

CONTRACT by the assignee under an instrument in writing of Alfred H. Leeming and Elisha H. Small, two of the five sureties on a certain promissory note, which was paid by the plaintiff's assignors, against another of the five sureties for contribution. Writ dated February 25, 1915.

In the Superior Court the case was tried before *Brown*, J. The note was dated February 24, 1909, and was originally for $6,750. It was payable to the B. M. C. Durfee Safe Deposit and Trust Company and recited that the makers had deposited as collateral

security a certificate for one hundred and forty-five shares of the Higgins-Fraze Company. The note was signed by William A. Fraze as principal and by Alfred H. Leeming, William Squire, Elisha H. Small, Michael J. Kelly and Margaret Kelly as sureties. The balance due on the note on February 24, 1915, was $4,100 and this amount was paid on that day by the plaintiff's assignors. All the parties who had signed the note except Margaret Kelly were living on that day. The bond of the administrator of Margaret Kelly's estate was approved on March 10, 1911.

Certificates for one hundred and forty-five shares of stock in the Higgins-Fraze Company, a Massachusetts corporation, were handed to the cashier of the payee with the note in question on the date of the note, in compliance with the provision in the note for the giving of collateral security. At the date of the note the one hundred and forty-five shares of stock in the Higgins-Fraze Company were worth their par value, $100 a share. In June, 1910, a sale was made in the market of some of the stock of that corporation at the rate of $37 a share. In 1915, when the plaintiff's assignors paid the balance of the note, the Higgins-Fraze Company had failed absolutely and had gone out of business. No effort was made by the payee of the note to sell the one hundred and forty-five shares that it held or any part thereof.

In 1911 the payee delivered up to Fraze the certificate calling for one hundred and forty-five shares of the Higgins-Fraze Company stock that it had received with the note and took in its stead a certificate calling for forty-two shares of the Higgins-Fraze Company stock.

The defendant was a brother-in-law of Fraze and signed the note at his request "but received no physical consideration for his signature."

The treasurer of the payee testified that the payee had made no effort to sell the stock that had been given it as security. Upon objection by the plaintiff the judge ordered this evidence of the payee's treasurer stricken out. The defendant excepted.

At the conclusion of the evidence, at the plaintiff's request, the judge ordered the jury to return a verdict for the plaintiff, but refused his request that the verdict be for one fourth the amount paid and directed a verdict for one fifth thereof and interest, namely, $914.30, and reported the case for determination by this court.

After the verdict the defendant offered the following amendment to his answer:

"That the defendant is discharged from liability in connection with said note because the payee gave up to the principal debtor the shares of stock held by it as security and given to it with said note and took in place thereof a lesser number of shares without the consent of the defendant and other sureties."

The judge refused to allow this amendment.

If the orders to strike out the portion of the testimony of the payee's treasurer and to return a verdict for the plaintiff were correct, judgment was to be entered for the plaintiff for one fourth or one fifth of the amount paid, as this court should decide.

If ordering a verdict for the plaintiff was wrong or if the direction ordering such evidence stricken out was wrong, the verdict was to be set aside and the case was to stand for trial or such other disposition was to be made of the case as this court should determine.

The case was submitted on briefs.

J. A. Kerns, for the defendant.

F. A. Pease, for the plaintiff.

BRALEY, J. The plaintiff's assignors having paid the promissory note on which the defendant with themselves and two other persons had become bound jointly and severally to the payee as sureties, the right accrued to enforce contribution in an action at law. And, notwithstanding the decease of one of the co-sureties, the plaintiff is entitled to recover, not one quarter, but one fifth of the amount which he has paid. *Griffin* v. *Kelleher*, 132 Mass. 82, 83, and cases cited.

By the tenor of the note the payee was charged with notice of the relations between the principal debtor and the sureties. *Guild* v. *Butler*, 127 Mass. 386, 389. And the payee, as the jury could find, having voluntarily relinquished without the consent or knowledge of the sureties a part of the security, the defendant, even if not thereby entirely discharged, would be exonerated to the extent to which he had been injured.

While this defence may be made at law as well as in equity by a surety sued for contribution, yet it is unavailable because not pleaded. *Guild* v. *Butler, ubi supra*. *Friedenwald Co.* v. *Warren*, 195 Mass. 432, 434. And whether after a verdict for the plaintiff the

defendant should have been permitted to amend his answer setting up exoneration, where unless the motion was denied a new trial would be necessary, as the jury had not passed upon the issue, was a question within the discretion of the presiding judge, whose refusal to allow the amendment shows no error of law. *Darrow* v. *Braman*, 201 Mass. 469, 472.

The remaining defences of the statute of limitations, the extension of the time of payment of principal and interest by the acceptance of instalments, and that upon demand the assignors voluntarily paid the amount remaining due on the note, and that the payee lost its rights against the sureties because it failed to sell, but remained inactive while the security depreciated and finally became worthless, are unsupported by the record.

The note expressly provides, "And it is part of the undertaking of the sureties hereon that their liability shall continue as long as this note or any part of the same or any renewals thereon or part of said renewals remain unpaid notwithstanding any extension or extensions of the time of payment at the same or any other rate of interest and without notice to them." Nor is it shown that the assignors knew of the partial surrender of the pledged shares. And a surety, being bound to pay the debt, is not obliged to incur the costs of defending an action. *Warner* v. *Morrison*, 3 Allen, 566.

If the value of the collateral which the payee held not merely for its own security but in trust for the indemnity of the sureties has been lost through forbearance or delay, no wrongful conduct of the payee appears. The sureties did not move. They could have discharged the debt at any time before depreciation set in and received the security. But having remained inactive, and there being no evidence of any affirmative act of negligence by the payee which resulted in their injury, the defendant has not been discharged either wholly or partially. *American Surety Co.* v. *Vinton*, 224 Mass. 337, 339, 340. *Gray* v. *Farmers' National Bank*, 81 Md. 631. *Benedict* v. *Olson*, 37 Minn. 431. *Newark* v. *Stout*, 23 Vroom, 35. *Schroeppell* v. *Shaw*, 3 Comst. 446. *Hayes* v. *Ward*, 4 Johns. Ch. 123, 130. *Otis* v. *Von Storch*, 15 R. I. 41. *Uniontown Bank* v. *Mackey*, 140 U. S. 220.

We have considered all the questions argued and by the terms of the report the plaintiff is to have judgment on the verdict.

So ordered.

CITY OF FALL RIVER & others *vs.* PUBLIC SERVICE COMMISSIONERS & another.

CITY OF FALL RIVER *vs.* BAY STATE STREET RAILWAY COMPANY.

Suffolk. Bristol. October 22, 1917. — December 8, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Street Railway. Globe Street Railway Company. Public Service Commission.

The provision of St. 1898, c. 578, § 11, by which street railway corporations were relieved from all obligations thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation to do so had been imposed in a grant of original location, was not repealed nor superseded by St. 1911, c. 552, so as to revive the former obligation of the Globe Street Railway Company to repair the surface of the old Slade's Ferry Bridge in Fall River, and the successor of that street railway company is not bound to repair the surface of the bridge named.

Under the power conferred on the public service commission by St. 1913, c. 784, §§ 20, 21, that commission properly may authorize the successor of the Globe Street Railway Company to discontinue the sale of six tickets for a sum not exceeding twenty-five cents, "each of which tickets shall entitle a passenger to one ride over said company's lines, in this city" of Fall River, although the sale of such tickets was required as a condition in the grant of location of that railway company.

PETITION, filed in the Supreme Judicial Court on March 10, 1917, under St. 1913, c. 784, § 27, by the city of Fall River and its mayor and the president of its board of aldermen against the members of the public service commission and the Bay State Street Railway Company praying this court to review, annul, modify or amend the rulings and order made by the respondent commissioners on March 6, 1917, permitting the schedule, filed by the respondent corporation and referred to in such order, to become effective at the end of the period of suspension fixed by the respondent commissioners; and

CONTRACT by the city of Fall River against the Bay State Street Railway Company, as the successor and assignee of the Globe Street Railway Company, for the alleged breach of a bond under seal by which the Globe Street Railway Company covenanted to perform the conditions imposed upon it by an order of the board of selectmen of the city of Fall River, passed on October 21, 1895,

granting to that street railway company the right to lay its tracks on Slade's Ferry Bridge and through certain streets according to plans on file, the alleged breaches being the failure of the Bay State Street Railway Company to perform the conditions imposed upon its predecessor, the Globe Street Railway Company, by failing to keep in repair the roadway of Slade's Ferry Bridge and by failing to sell six tickets for a sum not exceeding twenty-five cents. Writ dated March 19, 1917.

In the first case the respondent the Bay State Street Railway Company demurred to the petition and assigned the following causes for demurrer:

"1. That said petition sets forth no ruling or order of the public service commission which is unlawful.

"2. That by the provisions of the general law now in force this respondent may make rates for the service which it performs subject only to the power to regulate and prescribe the same that is lodged with the public service commission, which is given full and complete authority over all rates and charges for services rendered by common carriers, to be exercised notwithstanding any agreement entered into by reason of any requirement or recommendation of any board of public officials acting under delegated authority from the General Court.

"3. That St. 1911, c. 552, was repealed by St. 1913, c. 784.

"4. That the said commutation rate in Fall River if enforced as the petitioners seek to have it does not secure to the respondent a reasonable return for the service rendered and deprives it of its property without due process of law and denies to it the equal protection of the law in contravention of articles 10 and 12 of the Declaration of Rights and the Fourteenth Amendment of the Constitution of the United States."

The first case was heard upon the demurrer of the respondent the Bay State Street Railway Company by *Loring*, J., who made a final decree sustaining the demurrer and ordering that the petition be dismissed.

The action of contract was heard in the Superior Court by *Morton*, J., without a jury. An agreed statement of facts was submitted as follows:

The board of aldermen of the city of Fall River on October 21, 1895, passed the order described in the above statement. At the

time of the order, and at the time of the execution by the respondent corporation of the bond mentioned in the plaintiff's declaration, the regular fare duly established in and for the city of Fall River was five cents. After the order of October 21, 1895, the Globe Street Railway Company put in operation its cars over the location therein named, and the cars have continued to be operated over such location by the Globe Street Railway Company and its successor, the Bay State Street Railway Company, up to the present time.

Since St. 1911, c. 552, went into effect, the plaintiff has been obliged to pay $50 to keep in repair the roadway on said bridge and it has not been reimbursed for said sum. Since the enactment of St. 1898, c. 578, and up to the enactment of St. 1911, c. 552, the plaintiff paid all the expense of repairing the roadway of the bridge, and since the enactment of said chapter 552 the defendant has paid all such expense except the $50 above referred to. This location over the Slade's Ferry Bridge was not the first location in Fall River which was granted to the Globe Street Railway Company.

The defendant, Bay State Street Railway Company, has succeeded to the franchises, rights and obligations of the Globe Street Railway Company, which latter road was consolidated with the Brockton Street Railway Company on January 19, 1901, and was consolidated with the defendant on July 1, 1911.

On March 15, 1917, the defendant discontinued the sale of six tickets for twenty-five cents.

The plaintiff offered to prove that the officials and agents of the city of Fall River patronized the defendant street railway company and in the year 1915 the city purchased said four and one sixth cent tickets to the amount of $2,597.85, and in the year 1916 purchased said tickets to the amount of $2,547.25.

The defendant objected to the admission of this evidence but, if admissible, agreed that the facts were as stated.

The judge found the facts to be as stated in the agreed statement of facts and excluded the evidence contained in the plaintiff's offer of proof. He found for the defendant and, at the request of the parties, reported all questions of law arising upon the facts as found by him and the offer of proof for determination by this court, with a stipulation that, if his decision was right, judgment should

be entered for the defendant, and that, if his decision was wrong, the case should be remanded to the Superior Court for such further proceedings as this court might direct.

A. S. Phillips, (*G. Grime* with him,) for the city of Fall River.

S. H. Pillsbury, for the Bay State Street Railway Company.

BRALEY, J. It appears among the terms of the grant of location to the Globe Street Railway Company, to whose franchises and obligations so far as involved in the cases at bar the defendant company has succeeded, that the company was "to construct, electrically equip, and maintain its tracks . . . on Slade's Ferry Bridge . . . according to the plans on file," subject to the conditions that the company, its successors and assigns "shall, so long as its tracks continue to be on said . . . bridge, keep in repair, at its own expense, all of the roadway of said bridge, for its entire length, to the satisfaction" of the city engineer and the surveyor of highways, and shall furnish a bond "for the faithful fulfilment of the terms and conditions of this order." The order was passed on October 21, 1895, and, the bond having been given and approved and the location having been accepted and continuously used as a part of its railway system, the company and its successors were bound to comply with this condition. Pub. Sts. c. 113, § 7. R. L. c. 112, § 11. *Mayor & Aldermen of Worcester* v. *Worcester Consolidated Street Railway*, 192 Mass. 106, 113, 115.

But, as pointed out in *Springfield* v. *Springfield Street Railway*, 182 Mass. 41, the Legislature may modify or annul a location of this nature without violation of any constitutional provision. By St. of 1898, c. 578, § 11, street railways were relieved "from all obligation thereafter to keep any portion of the surface material of streets, roads and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in the city or town as to whose streets, roads or bridges there might be a question." *Worcester* v. *Worcester Consolidated Street Railway*, 182 Mass. 49, 52.

The agreed facts show that the location in question was not the first or original location, and neither the company nor its successor was required after the passage of the statute to reimburse the plaintiff city for expenditures in making repairs. The city however contends that the St. of 1911, c. 552, superseded the St. of

1898, c. 578, § 11, by expressly requiring the company and its successors to make such repairs as might be needed. The St. of 1911, c. 552, amends St. of 1910, c. 654, § 6, and when the original and amendatory acts are read in conjunction it is manifest that the St. of 1910, c. 654, § 1, provides solely for "the reconstruction of the joint railroad and highway bridge, commonly known as Slade's Ferry Bridge, . . . the old Colony Railroad Company, its successors or assigns, shall reconstruct said Slade's Ferry Bridge and locate the same at a point northerly thereof, but not exceeding one hundred feet therefrom, in the manner hereinafter stated. . . . The said reconstructed bridge shall be of sufficient width to provide two tracks for the railroad part and also two tracks for street railways on the highway part so that two street cars may conveniently meet and pass each other thereon while going in opposite directions; and due provision shall be made for the acommodation of foot passengers." It is only upon completion of the new bridge authorized by the statute that § 6 as amended becomes operative, and the old bridge built under St. 1872, c. 295, is to be discontinued for "highway and railroad purposes." It is not contended that the new bridge has been built, with the approaches and ways, and opened for use as provided in St. 1910, c. 654, as amended, which contains no repeal of St. 1906, c. 463, Part III, § 79, recodifying R. L. c. 112, § 44, which re-enacted St. 1898, c. 578, § 11. And the St. of 1911, c. 552, is inapplicable, that "Any street railway company owning the tracks on the highway part of the old Slade's Ferry Bridge, shall have the right to lay double tracks on the highway part of said reconstructed bridge and to connect its tracks with the same on both sides of the river . . . subject, however, to all the conditions as to fares and other matters mentioned in the grant of location to the Globe Street Railway Company by the board of aldermen of the city of Fall River . . . on the old Slade's Ferry Bridge, which are hereby approved and confirmed; and all successors or assigns of said Globe Street Railway Company shall be bound by and subject to the said conditions."

The grant of location contained the further condition, the performance of which also was secured by the bond, that the railway company will sell six tickets for a sum not exceeding twenty-five cents, "each of which tickets shall entitle a passenger to one ride

over said Company's lines, in this city, on as favorable conditions as their passengers are now carried. The fares for passengers without tickets are not to be affected by the above rate for tickets." And this provision has not been complied with by the company since March 15, 1917. But the St. of 1913, c. 784, with certain exceptions not applicable in the present case placed the subject of fares on all street railways under the exclusive control of the public service commission. It provides in § 29 that "This act shall be deemed and construed as a remedial act and in enlargement and extension of all previous acts and existing laws conferring upon or vesting in the commission any jurisdiction, powers or discretion with respect to any subject or matter treated in this act," and ". . . all acts and parts of acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the commission are hereby repealed."

The statute being constitutional and the powers of the commission plenary over the regulation and establishment of fares on street railways, independently of whatever conditions may have been imposed in antecedent grants of location by selectmen of towns or municipal boards, *Arlington Board of Survey* v. *Bay State Street Railway*, 224 Mass. 463, 469, the decision under which the "four and one sixth cent ticket sold in strips of six tickets for twenty-five cents in the City of Fall River" was withdrawn and the refusals to give the rulings requested by the plaintiff disclose no errors of law.

If from the allegations of the petition, admitted by the demurrer, it is to be assumed that an order was entered in conformity with the decision, the inquiry under St. 1913, c. 784, §§ 20, 21, whether an increase of fare is necessary "in order to obtain a reasonable compensation for the service rendered," is primarily a question of fact. It is not limited to any particular part of the system which if operated by itself might be found to be more than self sustaining. And the question whether the company should be permitted to withdraw the commutation tickets called for the exercise of the sound discretion and judgment of the commission, based on the evidence of the company's financial condition, and ability to serve efficiently the public dependent upon the maintenance of its entire system of intercommunication and transportation. We are

unable to perceive on the record before us any conclusions of fact, in so far as conclusions of fact are involved, which were unlawful. It is only where "any rulings or orders of the commission . . . are unlawful" that this court in equity can "annul, modify or amend" them "to the extent only of such unlawfulness." St. 1913, c. 784, § 27. *Bulkeley* v. *New York, New Haven, & Hartford Railroad*, 216 Mass. 432, 433. The plaintiff, on whom the burden rests, having failed to show reversible error in either the suit in equity or the action at law, the result is that in the first case the decree of the single justice sustaining the demurrer and dismissing the bill should be affirmed with costs of the appeal, and in the second case judgment is to be entered for the defendant.

Ordered accordingly.

MASSASOIT-POCASSET NATIONAL BANK *vs.* WILLIAM A. BORDEN & another.

Bristol. October 22, 1917. — December 11, 1917.

Present: RUGG, C. J., DE COURCY, PIERCE, & CARROLL, JJ.

Bond. Jurisdiction. Judgment, On bond in court of limited jurisdiction, Proof of. *Mechanic's Lien. Police, District and Municipal Courts. Evidence,* Best and secondary.

It is settled that the jurisdiction of a district court, so far as it depends on the amount to be recovered, is to be decided by the *ad damnum* in the writ.

An action on a bond for $4,000 given to dissolve a mechanic's lien may be brought in a district court whose jurisdiction is limited to claims of $1,000 if the *ad damnum* set forth in the writ is only $1,000.

In the action above described it was *said* that there is no statute nor any principle of public policy that requires an inferior court with a pecuniary limit to its jurisdiction, upon proof of the breach of a bond on which an action is brought, to enter judgment for the full penalty of the bond in excess of the *ad damnum* of the writ which is all that the plaintiff asks for.

In a proceeding to enforce a mechanic's lien the final judgment is the decree of sale and this, like other judgments, can be proved only by the record, or a certified copy of it. A warrant of sale following such a decree corresponds to an execution in an action at law and such a warrant, or a certified copy of it, is not competent evidence to prove the decree of sale.

CONTRACT for $1,000 against the principal and surety on a bond for $4,000 given under R. L. c. 197, § 28, to dissolve a mechanic's

lien on the interest of the principal defendant in a parcel of land on the corner of Broad Street and Main Street in Bridgewater. Writ in the Second District Court of Bristol dated October 25, 1915.

On appeal to the Superior Court the case was heard by *White*, J., without a jury. The facts that appeared in evidence are stated in the opinion. The plaintiff offered in evidence the warrant of sale in the proceedings to enforce the mechanic's lien together with a certified copy of it.

The defendants objected to the admission of the warrant of sale on the ground that it was not competent evidence of any record, that it was not a copy of the record and that it was not evidence of the things which are stated in it, and objected to the admission of the certified copy for the same reasons and also on the ground that it was not a copy of the record of judgment.

The judge admitted in evidence the certified copy of the warrant of sale, subject to the defendants' exception.

It was agreed by counsel that a demand for payment was made on the defendant Borden and that payment was refused; that Ralph T. C. Jackson performed labor on the premises described in the bond; that he assigned his interest to the plaintiff and that the plaintiff had no other claim of lien.

Before the arguments the defendants filed a motion that judgment be entered for the defendants "for that upon all the evidence the plaintiff cannot recover." This motion was denied by the judge.

The judge found for the plaintiff in the sum of $1,000, "being so much of the penal sum named in the bond as was within the jurisdiction of the Second District Court of Bristol." He further ordered that execution issue in favor of the plaintiff in the sum of $870.58. The defendants alleged exceptions.

The case was submitted on briefs.

A. S. Phillips, for the defendants.

A. N. Lincoln & A. H. Hood, for the plaintiff.

PIERCE, J. This is an action on a bond dated October 15, 1913, given to the plaintiff as assignee of Ralph T. C. Jackson, by the defendant as principal and the defendant Royal Indemnity Company as surety, in the amount of $4,000.

The bond was given under R. L. c. 197, § 28, to dissolve a me-

chanic's lien upon the interest of the defendants in the real estate described in the bond, upon which the assignor of the plaintiff had claimed a lien pursuant to the provisions of R. L. c. 197 and acts in amendment thereof. The execution of the bond was not denied. On October 22, 1913, it was approved by the obligee, and on October 23 it was duly recorded in the registry of deeds for the county in which the property lies. The plaintiff, as assignee of the lienor Jackson, had the right to enforce the lien in Jackson's name, *Wiley* v. *Connelly*, 179 Mass. 360; as assignee, he was not "A person to whom a debt is due . . .;" nor was he "the party claiming the lien" within the meaning of R. L. c. 197, §§ 1, 28. In running to the plaintiff as assignee of the person claiming the lien the bond was not in conformity to the statute. It was therefore void as a statutory bond, *Rockwell* v. *Kelly*, 190 Mass. 439, but was good as a common law bond, binding on the parties although not made in the mode provided by the statute under which it purports to have been given. *Bank of Brighton* v. *Smith*, 5 Allen, 413. *Mosher* v. *Murphy*, 121 Mass. 276. *Pray* v. *Wasdell*, 146 Mass. 324. *Farr* v. *Rouillard*, 172 Mass. 303. *Howe* v. *Grimes*, 211 Mass. 33. See *Chertok* v. *Morang*, *post*, 598.

October 25, 1915, action was brought on the bond in the Second District Court of Bristol with the *ad damnum* in the writ of $1,000. That court dismissed the action for want of jurisdiction. On appeal, the defendants filed in the Superior Court a motion that judgment be entered for the defendants; the motion was denied and the judge found for the plaintiff.

It is settled that the jurisdiction of district courts, so far as it depends upon the amount or value of the thing in question, is to be decided solely by the *ad damnum* set forth in the writ; and it is also settled that the jurisdiction of the Superior Court, as an appellate court is dependent on the jurisdiction of the inferior court. *Ashuelot Bank* v. *Pearson*, 14 Gray, 521. *Hall* v. *Hall*, 200 Mass. 194. In the case at bar, notwithstanding the *ad damnum* of the writ is not greater than the jurisdiction of the district court, it is contended that that court was without jurisdiction to hear and determine the issues because upon proof of a breach the judgment must be for the penalty of the bond, R. L. c. 177, § 9, *Newton* v. *Rice*, 118 Mass. 417; and also because it would be erroneous to enter judgment in excess of the *ad damnum* of the writ. *Safford*

v. *Weare*, 142 Mass. 231. *French* v. *Goodnow*, 175 Mass. 451. But we are of opinion that neither the statute nor any principle of public policy requires of an inferior court upon proof of a breach of a bond the entry of a judgment for the full penal sum of that bond, against the expressed desire and consent of the obligee to an entry of a judgment within the *ad damnum* of his writ and the jurisdiction of that court. *Huntress* v. *Burbank*, 111 Mass. 213.

The admission of the warrant of sale and a certified copy thereof, as evidence of a final judgment in the suit brought to enforce the lien, was error. The final judgment in a lien suit is the decree of sale which establishes the lien for a certain amount and orders a sale of the premises. The warrant of sale which issues upon and follows this decree corresponds to an execution which follows a final judgment in a common law action. A disputed judgment can be proved only by the record of that judgment or by a copy thereof duly attested by the clerk of the court wherein it was rendered. *Hoover* v. *Jones*, 84 Neb. 662.

The motion that judgment be entered for the defendants was denied rightly. The exception to the admission of the evidence is sustained.

So ordered.

THOMAS M. REYNOLDS *vs.* MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY & trustees.

Suffolk. October 18, 19, 1917. — December 12, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Res Judicata. Practice, Civil, Law of case, Exceptions. *Jurisdiction. Corporation,* Foreign. *Equity Pleading and Practice,* Amendment. *Waiver.*

Where a suit in equity against a foreign corporation, which was begun by the insertion of the bill in a common law writ, is amended into an action at law, it remains the same proceeding, and a decision of this court, made in the suit in equity before the amendment, that the defendant was engaged in business as well as soliciting business in this Commonwealth and under St. 1913, c. 257, properly was served with process in the manner provided for service in actions against domestic corporations, is the law of the case, and the defendant cannot be allowed to set up in abatement of the action at law the alleged defence that the court has no jurisdiction for want of proper service on the defendant.

In the same case it was *said* that the plaintiff, by filing a replication to the plea to

the jurisdiction of the court in the suit in equity before the amendment into an action at law, did not waive his right to object to the reopening in the action at law of the issues disposed of in the suit in equity before the amendment.

In the same case it was *held*, that, although the proper practice for the plaintiff would have been to join issue on the plea in abatement to the jurisdiction of the court contained in the defendant's answer in the action at law, the fact that the plaintiff, instead of doing this, resorted to the procedure of moving to strike out from the defendant's answer the portion adjudicated against the defendant in the suit in equity, which motion was allowed by the judge, did not injuriously affect the substantial rights of the defendant and under St. 1913, c. 716, § 1, gave it no right of exception.

Where a foreign corporation actually doing business in this Commonwealth has been brought within the jurisdiction of a court of this Commonwealth by the service under St. 1913, c. 257, of a writ upon its agent, who is a resident of this Commonwealth, voluntarily appointed by it to have charge of its business here, it becomes answerable in this jurisdiction to any transitory cause of action, including an action at law on promissory notes made and negotiated by it in another State.

BILL IN EQUITY, inserted in a common law writ dated August 31, 1915, against the Missouri, Kansas and Texas Railway Company, a corporation organized under the laws of the State of Texas and alleged to have a usual place of business in Boston, and fourteen trustees summoned by trustee process, amended by leave of court on December 8, 1916, into an action at law against the defendant as the maker of certain promissory notes, as described in the opinion.

In the report of this case at its previous stage in 224 Mass. 379, the bill in equity is described as having been filed on September 3, 1915, instead of giving the date of the common law writ in which it was inserted, August 31, 1915. The date of filing was taken from the printed record of the case as reported by the judge.

The proceedings in the action at law are described in the opinion. The first bill of exceptions there described was allowed by *Jenney*, J., who made the order excepted to granting the plaintiff's motion to strike out the first part of the defendant's answer. The order was "that so much of said answer be stricken out as sets up that the defendant . . . 'has never appointed any agent upon whom service of any processes against' it 'might be made in this State,' and so much thereof as sets up that the defendant '. . . did not have any place of business in this State at the time of the commencement of this action or at the time of the service of any

process therein purporting to be made upon the defendant, and was not at any of the said times engaged in any business or doing anything else in this State except soliciting there various persons to travel over its railways situate in the States of Missouri, Kansas, Oklahoma and Texas.'"

Later the case was tried before *Hardy*, J. The judge found upon the evidence that the defendant did not make, issue or negotiate in this Commonwealth any of the promissory notes mentioned in the plaintiff's declaration.

The defendant asked the judge to rule "that, if the defendant, being a Kansas corporation, did not make, issue or negotiate in this State the promissory notes mentioned in the plaintiff's declaration or any of them, the defendant is not subject to the jurisdiction of this court as regards any of the said promissory notes, and the service of process appearing by the returns of officers upon the process in this action was not due process of law against this defendant in respect thereof according to the Constitution of the United States." The judge refused this request.

The judge ruled at the request of the plaintiff that, whether the defendant negotiated, made or issued the notes sued on in this Commonwealth, was wholly immaterial. He found for the plaintiff and assessed damages in the sum of $244,720. The defendant alleged exceptions.

J. L. Thorndike, for the defendant.

B. Corneau, for the plaintiff.

DE COURCY, J. This is an action by the holder against the maker of certain promissory notes. It was commenced by a writ of trustee process, containing a bill in equity to reach and apply equitable assets attached. The defendant filed a plea to the jurisdiction of the court, alleging that it was incorporated under the laws of Kansas, was not doing business in Massachusetts and did not have here any place of business or agent to do any business in its behalf. After a hearing the plea was overruled by the Superior Court; and that decision was affirmed by this court. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 224 Mass. 379.

At a later stage in the proceedings the plaintiff asked for and obtained leave to amend the suit into an action at law, and filed a declaration upon the same promissory notes. The defendant then filed an answer, the first part (which alone is now material) setting

up in abatement the same facts it had alleged previously in the plea to the jurisdiction. Before the case came on for trial the trial judge, upon a motion of the plaintiff and after hearing, ordered stricken from the answer the allegations to the effect that the defendant had never appointed an agent upon whom service of any process against it might be made in Massachusetts and did not have any place of business in this State, and was not here engaged in any business or doing anything else except soliciting persons to travel over its railway situated in other States. The correctness of this ruling is brought before us by the defendant's first bill of exceptions.

The case came on for trial before another judge without a jury. The defendant requested the judge to rule, in substance, that if it did not make, issue or negotiate in this State any of the promissory notes, it was not subject to the jurisdiction of the court as regards any of them, and the service of process was not due process of law against the defendant in respect thereof according to the Constitution of the United States. The judge refused so to rule, and ruled that it was wholly immaterial whether the defendant negotiated, made or issued the notes in this State. The only question raised by the defendant's second bill of exceptions is the correctness of this ruling and refusal to rule.

1. It was assumed by the trial judge, and we think rightly, that by the parts of the answer stricken out the defendant intended to raise again the identical issues that had been raised by its plea to the jurisdiction. It had been adjudicated at an earlier stage of the proceedings that the defendant company was doing business within the Commonwealth, and that the service of process upon it, in accordance with St. 1913, c. 257, was adequate. That settled the law of the case in the trial court. The defendant was not entitled as of right to a second trial of these issues merely because the pleadings had been changed from a bill in equity to a declaration at law, and issue had been joined on the answer by a general replication. The plea to the jurisdiction attacked the service of the writ; and no new writ was issued or new service made. The amendment of the pleadings did not make the action a new one. The statute authorizing such amendments provides expressly that the court shall retain jurisdiction of "the cause as amended." R. L. c. 173, § 52. The cause continued the same throughout, with no

part of the record expunged. The plaintiff's right to interest from the date of the writ remained. *Cormier* v. *Brock*, 212 Mass. 292. If the cause of action was not barred by the statute of limitations when the suit was originally brought it would not be barred when the amendment was allowed. *Smith* v. *Butler*, 176 Mass. 38, 42. The question of jurisdiction, settled on the equity side of the court, could not be reopened as matter of right when the case was transferred to the law side. See *Gahm* v. *Wallace*, 206 Mass. 39. Nor did the plaintiff by filing a replication waive his right to object to a second trial of the issues raised by the plea to the jurisdiction.

The proper practice would have been a joinder of issue by the plaintiff on the plea in abatement, alleging that the question had already been decided and had become the law of the case; but the procedure followed (striking out parts of the answer), did not injuriously affect the substantial rights of the defendant. St. 1913, c. 716, § 1. This exception must be overruled.

2. In deciding the issue raised by the second bill of exceptions, we must consider it settled by the earlier decision that the defendant was in fact doing business in Massachusetts, and that it voluntarily had appointed George E. Marsters, a resident within this Commonwealth, to have charge of its business as New England passenger agent, with headquarters in Boston. See 224 Mass. 379, 383, 385. By thus establishing a domicil of business in this Commonwealth, the defendant, under the provision of St. 1913, c. 257, made itself amenable to service of process here in the same manner as a domestic corporation. Proper service having been made, the defendant was brought within our jurisdiction, and became answerable here to this transitory cause of action, which is enforceable wherever the defendant may be found. It is of no legal consequence that the promissory notes sued on were made or negotiated outside of the State. And the argument *ab inconvenienti* urged on behalf of the defendant is met by one of equal force on the side of the plaintiff. *Roberts* v. *Knights*, 7 Allen, 449. *Johnston* v. *Trade Ins. Co.* 132 Mass. 432. *Dennick* v. *Railroad Co.* 103 U. S. 11. *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100. *Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602.

In support of its contention that it is not subject to the jurisdiction of our courts as regards promissory notes not made or nego-

tiated by it in this State, and that the service of process was not due process of law against it in respect thereof, the defendant relies on the cases of *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8, and *Simon* v. *Southern Railway*, 236 U. S. 115. But the question decided in those cases is not the one before us. In *Old Wayne Mutual Life Association* v. *McDonough* an action was brought in Pennsylvania upon an insurance contract executed in Indiana by an Indiana corporation. That corporation, although doing business in Pennsylvania, did not file the stipulation as to service of process upon the insurance commissioner, which by the statute of Pennsylvania was required of all foreign insurance companies doing business in that State. The service was made on the insurance commissioner. No legal notice was given to the association, and it did not appear in the suit. The service was held to be invalid. The court said: "While the highest considerations of public policy demand that an insurance corporation, entering a State in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another State, although citizens of the former State may be interested in such business."

The principle laid down, as we understand it, is that while a foreign corporation is estopped to take advantage of its failure to file the stipulation required by law, if the cause of action arose in the State seeking to impose the liability, the estoppel will not be extended to a case where the cause of action did not arise out of business transacted in that State. The same principle was applied in the Simon case. The plaintiff brought an action in the courts of Louisiana against a Virginia corporation, for an alleged tort committed in Alabama. The railway company had not designated an agent upon whom service might be made, as the local statute required of foreign corporations doing business in the State; nor in fact was it determined that the company was doing business in Louisiana. Service of the summons was made on the Assistant Secretary of State, no notice of the suit was given to the railway, and it made no appearance. The "implied assent," or estoppel arising out of the railway's failure to provide for the statutory service, was not extended to the cause of action arising in another

State, and the service was held not to be sufficient to give the court jurisdiction.

In neither of these cases did the court decide that a foreign corporation engaged in business in another State, and which has filed the required appointment of a statutory agent, is not subject to the jurisdiction of the latter State in transitory actions originating outside that State. In such case presumably the jurisdiction would depend, not on implied assent or estoppel, but on the scope of the statutory appointment, as construed by the court. *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.* 243 U. S. 93. *Gold Issue Mining & Milling Co.* v. *Pennsylvania Fire Ins. Co.* 267 Mo. 524. *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.* 217 N. Y. 432. *Smolik* v. *Philadelphia & Reading Coal & Iron Co.* 222 Fed. Rep. 148. Much less did the court, in the Old Wayne and Simon cases pass upon the question before us, namely, the effect of service on an agent voluntarily appointed by a foreign corporation. In the Simon case the court expressly refrained from passing on this question, saying ". . . without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the court below, that in this case the cause of action arose within the State of Alabama, and the suit therefor, in the Louisiana court, was served on an agent designated by a Louisiana statute."

It having been adjudicated that the defendant corporation was engaged in business in Massachusetts, that it had subjected itself to the jurisdiction of our courts by the voluntary appointment of an agent representing it generally and that the service of process upon it was adequate, we are of opinion that the jurisdiction of the court was not limited to causes of action arising in this Commonwealth. It may be added, if material, that the defendant has been represented by counsel at every stage of the proceedings. We find no error in the trial judge's ruling and refusal to rule set forth in the second bill of exceptions.

Exceptions overruled.

BRIDGET A. RYAN *vs.* AMANDA E. ANNELIN.

Worcester. October 1, 1917. — December 31, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Equity Pleading and Practice, Waiver of want of equity, Costs, Report by judge. *Practice, Civil*, Costs. *Judgment*, Satisfaction. *Joint Tortfeasors*.

Where in a suit in equity the defendant answers to the bill without demurrer and goes to trial on the merits he has waived any right to set up want of equity in the allegations of the bill.

Where two persons are sued in separate actions for the same cause of action and a judgment for the full amount of damages with costs is entered against each of them, if one of them pays the judgment in full, this discharges the other from his liability for the damages but he still is liable for the costs awarded against him.

Under the authority given to a trial judge by R. L. c. 203, § 9, where two cases are tried together, to "reduce the witness fees and other costs," if the two cases are against different persons and each for the same cause of action and a recovery is had against each of the defendants, although the judge may order that only one set of costs shall be recovered provided that appears to be just, he is not obliged to make such an order, and, after a separate judgment for the full amount of damages with costs has been entered against each defendant, it is not possible to make such a readjustment.

Although in the present suit in equity, which was reported by the trial judge for determination by this court, it was stated in the record that a "final decree" had been entered, the record was treated as presenting an order for a decree, because after a final decree the only report that the trial judge could make would be of the material facts in case of an appeal.

In the same case it was *said* that, where on an appeal from a final decree in equity no error appears, the correct disposition of the case is by an order affirming the decree and not by an order dismissing the appeal as was provided by the form of the report in the present case.

BILL IN EQUITY, filed in the Superior Court on June 7, 1917, to restrain the collection of a judgment in an action at law against the plaintiff, as described in the opinion.

The case was heard by *Hamilton*, J., who made a "final decree," treated by this court as an order for a decree, "that said judgment in the common law case of Annelin v. Ryan is satisfied in full except for the sum of thirty-four and 11/100 dollars costs." The defendant appealed. At the request of the defendant with the consent of the plaintiff the judge reported the case for determination by this court.

R. L. c. 203, § 9, is as follows: "If two or more cases are tried together in the Supreme Judicial Court, in the Superior Court or in a police, district or municipal court, the presiding judge may reduce the witness fees and other costs; but not less than the ordinary witness fees and other costs recoverable in one of the cases which are so tried together shall be allowed."

The case was submitted on briefs.

J. G. Annala, for the defendant.

J. P. Carney & H. W. Blake, for the plaintiff.

RUGG, C. J. This is a suit in equity whereby the plaintiff seeks to restrain the defendant from collecting an execution against her. The case proceeded to trial without objection. That was a waiver of any right to set up want of equity. *Bauer* v. *International Waste Co.* 201 Mass. 197.

The pertinent facts are that the defendant at different times brought two several actions, one against the plaintiff and the other against one Canavan, both for the same cause of action, and recovered general verdicts in each action for the same amount. Judgment was entered in favor of the present defendant in the action against Canavan for $355.62, debt and damages, and for $75.70 costs. Although the evidence was conflicting, it might have been found, as seemingly it was found by the judge of the Superior Court, that this judgment had been paid in full. There is no reason for disturbing that finding. The credibility of witnesses was wholly for the trial judge. The present plaintiff filed exceptions and a motion for a new trial in the action by the present defendant against her, upon which proceedings were had resulting in a remission of $38, the dismissal of the exceptions and the entry of judgment in favor of the present defendant for $323.92, debt and damages, and for $92.03, costs. It is to restrain the collection of an execution issued on this judgment that the present suit is brought.

The present defendant as plaintiff in the original actions had a right to prosecute both to judgment, but to collect only one satisfaction of the debt or damage. *Corey* v. *Havener*, 182 Mass. 250. *Cote* v. *New England Navigation Co.* 213 Mass. 177, 180. But she had a right to collect costs in both actions after having recovered judgments in both. It was said by Chief Justice Gray in *Savage* v. *Stevens*, 128 Mass. 254, at page 255, "It is clear . . . that if the plaintiff prosecutes several actions to judgment before receiving

any satisfaction, he may recover judgment in each action for damages and costs, and may levy execution in any one of the actions for the damages, and in each action for the costs adjudged to be due him." Other decisions to the same point are *Cook* v. *Hinsdale*, 4 Cush. 134, 138, and *Whipple* v. *Newton*, 17 Pick. 168.

In the case at bar it was recited in the order for a final decree that the judgment in the action of the present defendant against the present plaintiff was "satisfied in full except for the sum of thirty-four and 11/100 dollars costs." The judge filed no finding of facts and hence the basis for this conclusion is not stated and that arithmetical result is not easily manifest from the report. There was no evidence that the present defendant was paid anything more than the amount of the judgment for debt and costs in the action against Canavan. The ninety-three cents which was collected in excess of the face of that judgment presumably was interest for thirteen days. There was no evidence that anything had been paid directly on the judgment against the present plaintiff. Although the debt in the judgment against Canavan was larger than in that against the present plaintiff, she is not entitled to the benefit of that circumstance in this proceeding. The judgment against Canavan was established by the record of the court. Therefore it imported incontrovertible verity and could not be contradicted. In receiving payment of that judgment in full the defendant received no more than was due her. The only benefit which the present plaintiff gained by the payment of that judgment was the satisfaction of the portion of the judgment against her for debt or damages, but not for costs. The judgment against her for costs remained outstanding and unsatisfied in whole or in part.

Although the court before entering judgments in the original actions might have reduced the witness fees and other costs so that no more than one full set of costs might have been recovered under R. L. c. 203, § 9, (since perhaps it may be inferred that the cases were tried together,) provided that appeared to be just, it is not possible to make such a readjustment after judgment.

The record states that the court entered a "Final Decree" in substance that, if the plaintiff paid the defendant $34.11, perpetual injunction should issue, otherwise the defendant might proceed to the collection of that amount only, and that the de-

fendant appealed, and that then the court reported the case in these terms: "If, in any aspect of the pleadings and evidence, the decree was right, the appeal is to be dismissed; otherwise such a decree is to be entered as the merits of the case require." This was irregular. If the decree was in truth final, as this was according to its terms and effect, then after its actual entry the judge could not report the case further than to perfect the record so that all questions presented might be considered on the appeal. *Worcester* v. *Lakeside Manuf. Co.* 174 Mass. 299, 300. If the case were an appeal from a final decree and there was no error, the correct disposition of the case would not be to dismiss the appeal but to affirm the decree. However, we treat the record as presenting an order for a decree and not the entry of a final decree. *Bartlett* v. *Slater*, 211 Mass. 334, 352.

On the record as it now stands the plaintiff owes to the defendant the entire amount of costs adjudged to be due in the action of the defendant against the plaintiff. The order for final decree is to be modified by the insertion of that sum with interest to the date of the entry of the decree in place of the sum of "thirty-four and 11/100 dollars" in the two places where those words and figures occur, and as thus modified is to be entered as the final decree.

So ordered.

AUGUST PANELL *vs.* ANGELO ROSA & another.

Worcester. October 2, 1917. — December 31, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Evidence, Privileged communications between attorney and client, Of soundness of mind, Presumptions and burden of proof. *Attorney at Law. Will. Practice, Civil*, Exceptions. *Sanity*.

At the trial of a controversy between the proponent of a will, who was the husband of the alleged testatrix and was made the residuary legatee by the proposed will, and the heirs at law of the signer of the instrument, who was alleged by the contestants to have been of unsound mind, an attorney at law, who did not draw the alleged will but had acted as the legal adviser of the alleged testatrix, properly may be permitted to testify as a witness for the contestants, against the objection of the proponent of the will, that "two or three years ago he had a conversation with the testatrix when she came to consult him relative

to difficulties" with her husband and may tell what she said to him in that conversation.

At the trial described above the same witness, subject to the proponent's exception, was permitted to testify that he had warned the husband to keep away from his wife and had stated to him "that she dreaded him, that he had abused her and that she had become sick," and that the husband had admitted that he had abused his wife and said that "he would go and live somewhere else." *Held*, that this evidence had no bearing upon the question of the soundness of mind of the deceased wife and appeared to have been immaterial, and that its admission was harmless error under St. 1913, c. 716, § 1, and therefore afforded no ground for sustaining the exception.

In the same case there was testimony indicating strange conduct and unusual remarks on the part of the alleged testatrix, there was evidence that she had suffered a stroke of paralysis and a physician testified that all such "shocks have an effect of some kind on the mind." The single justice refused to rule that there was no evidence that would justify a finding that the alleged testatrix was of unsound mind. *Held*, that the refusal was right; that the burden was on the proponent of the will to show that the alleged testatrix was of sound mind, and that with the evidence stated above the general presumption of sanity did not as matter of law require a finding of testamentary capacity.

APPEAL from a decree of the Probate Court of the county of Worcester allowing the alleged will of Filmania Rose Panell, late of Worcester.

The appeal was heard by *Carroll*, J. The alleged will, which was dated December 4, 1916, left $100 to a godchild of the alleged testatrix and left the residue of her estate to the petitioner, August Panell, who it was agreed was the husband of the alleged testatrix until she obtained a divorce from him for cruel and abusive treatment about seven years before her death. The material evidence and the rulings of the single justice as to the admission of evidence are described in the opinion. At the close of the evidence the petitioner asked the justice "to rule that there was no evidence that would justify the court in finding that the testatrix, Filmania Rose Panell, was of unsound mind."

The justice refused to make this ruling and found that the alleged testatrix was not of sound mind. He made an order that the decree of the Probate Court allowing the will be reversed; and the petitioner alleged exceptions.

H. Davenport, for the petitioner.

D. F. O'Connell, J. E. Sullivan & C. H. L. Bock, for the respondents, submitted a brief.

RUGG, C. J. This is a petition for the allowance of an instrument purporting to be the will of Filmania Rose Panell, deceased.

One of the issues tried was whether she was of sound mind at the time of the execution of the instrument. As bearing upon that issue, a practicing attorney called by the contestants, who were the heirs at law of the deceased, was permitted against the exception of the proponent to testify that "two or three years ago he had a conversation with the testatrix when she came to consult him relative to difficulties with Mr. Panell. He said that she asked him to write Mr. Panell a letter to have him keep away from her, stating that he had struck her in the head, opened up a cut and otherwise abused her, causing her to become sick and dizzy." A different attorney drafted the instrument offered for probate.

The general rule of the common law is well settled that an attorney may not disclose matters communicated to him by his client under the confidence arising from the professional relation. The reason for the rule is familiar and need not be restated. *Foster* v. *Hall*, 12 Pick. 89, 93. *Temple* v. *Phelps*, 193 Mass. 297, 304. *Greenough* v. *Gaskell*, 1 Myl. & K. 98, 103. *Russell* v. *Jackson*, 9 Hare, 387. It frequently has been held that the rule of this privilege should be construed strictly. *Hatton* v. *Robinson*, 14 Pick. 416, 422. There are several exceptions to the rule. It was held in *Doherty* v. *O'Callaghan*, 157 Mass. 90, that the attorney who drafted a will might testify in a contest as to the allowance of the will, founded upon averments of unsoundness of mind and undue influence, in regard to what was said to him by the alleged testator when the latter consulted him for the purpose of having his will drawn. The ground of that decision was that the reason for the rule of privileged communications between attorney and client did not apply to testimony respecting such statements in a trial as to the allowance of the will.

The question of the extent of the privilege arose in *Phillips* v. *Chase*, 201 Mass. 444, in a petition for the revocation of a decree of adoption, by a woman since deceased, of a son of her husband, brought by her heirs and next of kin. Testimony was offered of an attorney to the effect that the deceased woman consulted him professionally and made oral statements and an affidavit to the effect that the adoption was not her free will and choice, but was brought about by ill treatment, duress and coercion and that she did not want it to stand. In discussing the question of this privilege it

was said by Chief Justice Knowlton, at page 449: "It is for the protection and benefit of the client, so that his disclosures may not be used against him in controversies with third persons. He may waive it, and if there is a controversy after his death between his estate and those claiming adversely to it, the privilege may be waived by his executor or administrator, (*Brooks* v. *Holden*, 175 Mass. 137,) or by his heirs (*Fossler* v. *Schriber*, 38 Ill. 172); but where the controversy is not between an estate and persons claiming against it, but is to determine who shall take by succession the property of a deceased person, and both parties claim under him, the reason for the privilege does not exist, and neither can set up a claim of privilege against the other. *Doherty* v. *O'Callaghan*, 157 Mass. 90. *Russell* v. *Jackson*, 9 Hare, 387. *Blackburn* v. *Crawfords*, 3 Wall. 175, 192, 194. *Glover* v. *Patten*, 165 U. S. 394, 406. See also, as tending to establish the same proposition, *Layman's Will*, 40 Minn. 371; *Coates* v. *Semper*, 82 Minn. 460; *Kern* v. *Kern*, 154 Ind. 29; *O'Brien* v. *Spalding*, 102 Ga. 490; *Scott* v. *Harris*, 113 Ill. 447, 454; *Thompson* v. *Ish*, 99 Mo. 160, 175." Although portions of the communications there under discussion were made with the request that they be communicated to her brothers after her death, and although this circumstance is referred to in the opinion, the ground of the decision is that above quoted. The principle there declared is supported by numerous authorities. *Holyoke* v. *Holyoke*, 110 Maine, 469, 475, 477. *Middletown Trust Co.* v. *Crowell*, 89 Conn. 290, 293. *Winters* v. *Winters*, 102 Iowa, 53, 57. *In re Shapter's Estate*, 35 Col. 578, 587. *In re Downing's Will*, 118 Wis. 581, 592. *Norton* v. *Clark*, 253 Ill. 557, 565. *Veazey's Case*, 10 Buch. 466, 470. *Black* v. *Funk*, 93 Kans. 60, 63. *Mahoney* v. *Healy*, 10 Del. Ch. 311. See *Matter of Cunnion*, 201 N. Y. 123, 128.

That principle controls the case at bar, where the controversy was between the proponent of the will and the heirs at law of the deceased, and the issue was her soundness of mind. There was no error in the admission of this testimony.

The same attorney was permitted to testify that he warned the husband to keep away from his wife, stated to him "that she dreaded him, that he had abused her and that she had become sick," and that the husband admitted that he had abused his wife and said that "he would go and live somewhere else." This seems to

have been admitted on the case in chief and not in contradiction of testimony of the husband. This evidence had no bearing upon the soundness of mind of the deceased wife and appears to have been immaterial. Its admission was harmless error. St. 1913, c. 716, § 1.

There was some testimony indicating strange conduct and unusual remarks by the deceased. She had suffered a paralytic shock and a physician testified that all such "shocks have an effect of some kind on the mind." Under these circumstances the general presumption of sanity did not as matter of law require a finding of testamentary capacity. The burden of proof was upon the petitioner to show by a fair preponderance of the evidence that the deceased was of sound mind. *Clifford* v. *Taylor*, 204 Mass. 358. The testimony was oral. It could not have been ruled as matter of law that this burden had been sustained. *McDonough* v. *Metropolitan Life Ins. Co. ante*, 450, and cases there collected.

Exceptions overruled.

BENJAMIN H. CHERTOK, assignee, *vs.* LUELLA F. MORANG & another.

Suffolk. October 19, 1917. — December 31, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Mechanic's Lien. Bond, To dissolve mechanic's lien, Void as statutory bond but good at common law. *Equity Jurisdiction,* To restrain enforcement or compel discharge of lien securing satisfied debt.

A bond to dissolve a mechanic's lien given before January 1, 1916, under R. L. c. 197, § 28, as amended by St. 1906, c. 223, and St. 1909, c. 237, which is not recorded in the registry of deeds within ten days after its approval and which therefore is not good as a statutory bond, if executed under seal and delivered and accepted, is good at common law, and the obligee in an action upon it can recover the amount of his unpaid debt.

In an action on such a bond it was *said*, that it was not necessary to determine, whether a municipal court in which the proceedings to enforce the mechanic's lien were brought had jurisdiction to make an order dissolving the lien upon the filing of such a common law bond, because the obligee of the bond, after having recovered in his action upon it the full amount of his debt, would not be permitted to enforce his mechanic's lien, even if it was not dissolved, and, if he should try to do so, the landowner could maintain a suit in equity against him to restrain

such enforcement and also might compel a discharge of the lien as shown by the record in the registry of deeds in case the satisfied creditor should refuse to make such discharge.

CONTRACT against two sureties on a bond given to dissolve a mechanic's lien. Writ dated January 7, 1916.

In the Superior Court the case was tried before *Aiken*, C. J., without a jury. The bond was dated April 23, 1915. Its execution by the defendants and its approval on April 23, 1916, by a master in chancery were admitted at the trial. It appeared by an indorsement upon the bond that it was received and entered for record at the registry of deeds for Norfolk County on December 15, 1915. Other material facts which could have been found upon the evidence are stated in the opinion.

The defendant offered no evidence, but asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff cannot recover."

"4. That on all the evidence there was no valid delivery of the bond to the plaintiff or his assignors.

"5. That the defendants are not liable upon the bond until there has been a valid delivery of the same.

"6. That the filing of the bond in the clerk's office of the Municipal Court of Brookline by the principal did not discharge the lien, the bond not having been recorded in the registry of deeds as required by law.

"7. That the bond is not a statutory bond.

"8. That neither the plaintiff nor his assignor has voluntarily waived their lien and there is therefore no consideration for the bond."

"10. That the plaintiff's lien has never been legally dissolved or vacated.

"11. That the judge of the Municipal Court of Brookline had no authority to order the bond delivered to Walter A. Powers. [The docket entries of the Municipal Court of Brookline contained an entry "that on December 15, 1915, by the order of the court the bond to dissolve the mechanic's lien was delivered to Walter A. Powers." The record contained nothing to show who Walter A. Powers was.]

"12. That the defendants have authorized no one to record the bond in the registry of deeds or deliver it to the plaintiff.

"13. That the principal of the bond not having been joined in this action, the plaintiff cannot recover."

The Chief Justice refused to make any of the rulings quoted above. He ordered that judgment be entered for the plaintiff in the sum of $500, the penalty of the bond, and that execution issue for the sum of $217.56 with interest amounting to $10.91 making a total of $228.47 as damages. The defendants alleged exceptions.

The material portion of R. L. c. 197, § 28, as amended by St. 1906, c. 223, and St. 1909, c. 237, is as follows: "A person who has an interest in property upon which the lien has been claimed may at any time before final judgment dissolve the lien upon his interest in the whole or any part of the property by giving bond to the party claiming the lien, with sureties who shall be approved in writing by him or his attorney, by a justice of a police, district or municipal court or by a master in chancery, conditioned to pay to such person within thirty days after final judgment an amount fixed as the value of said interest or so much thereof as may be necessary to satisfy the amount for which said interest may be found to be subject to such lien. . . . The bond shall contain a description of the property or interest to be released and the obligor shall, within ten days after its approval, cause it to be recorded in the registry of deeds for the county or district in which the property lies. The lien shall not be dissolved until the bond has been so recorded, after which the bond may be taken by the obligee from the registry."

St. 1915, c. 292, which was approved on May 28, 1915, took effect, as provided in § 14 of that statute, on January 1, 1916.

R. M. Smith, for the defendants.

C. S. Hill, for the plaintiff.

BRALEY, J. The defendants, while saving exceptions to the refusal to give their thirteen requests, have argued only the question of the validity of the bond under R. L. c. 197, § 28, or as an instrument at common law. The bill of exceptions is meagre, but the trial judge was warranted in finding, that a petition to establish a mechanic's lien was brought on February 25, 1915, in the Municipal Court of Brookline, and that on April 27, 1915, the petitioner's lien was established and an order of sale was to issue; that on April 27, 1915, a bond to dissolve the lien was filed by the

respondent, the debtor, being the bond in suit; that on April 30, 1915, judgment was entered for the petitioner, his lien was established and, the respondent having appealed, all the papers including the bond on June 5, 1915, were transmitted to the Superior Court from which they were returned to the Municipal Court of Brookline on October 29, 1915, where on December 15, 1915, "an order was handed down by the court that the petitioner's lien be dissolved and that the said order of the court entered April 30, 1915, in so far as it ordered a sale of the property be vacated and that the order of sale issued November 1, 1915, be returned and that the validity of the petitioner's claim be reaffirmed," and that the decree of sale was duly returned to the court. It further appears that on December 15, 1915, the court ordered the bond delivered to one Walter A. Powers, and that on the same day the bond "was received and entered for record" in the registry of deeds for the county where the land lay.

The proceedings were instituted before January 1, 1916, and the case is not within St. 1915, c. 292, but is governed by R. L. c. 197, § 28, as amended by St. 1906, c. 223, and St. 1909, c. 237. It is of course plain that upon the establishment of the lien the property would be charged for the amount under an order of sale. R. L. c. 197, §§ 17, 20. But, even if a bond had been given as provided in § 28, as amended, the lien would not be dissolved unless within ten days after its approval the bond was recorded by the obligor in the registry of deeds for the county or district where the land lies. And under § 28, it is not until such record has been made that the lien is automatically discharged and the obligee may take the bond from the registry, and upon the lien being established enforce it as a security taking the place of the property.

The bond was duly approved on April 23, 1915, and, not having been recorded within ten days after approval, the lien never has been dissolved. R. L. c. 197, § 28, as amended. *Powers Regulator Co.* v. *Taylor*, 225 Mass. 292, 297.

The plaintiff however contends that it is enforceable at common law. The instrument being under seal a consideration is conclusively presumed, and there was evidence from the filing of the bond in court by the obligor to justify a finding that it had been delivered for the petitioner's use. *Graham* v. *Middleby*, 185 Mass. 349. *Tompkins* v. *Wheeler*, 16 Pet. 106. It appears from the record

that after the bond had been filed the court ordered the lien dissolved, vacated the order of sale and ordered "that the validity of the petitioner's claim be reaffirmed." It is however unnecessary to determine whether the court had jurisdiction to enter the order of dissolution. The petitioner can have but one satisfaction of his claim or judgment. If the plaintiff prevails in the present action and the judgment is satisfied, he cannot enforce the lien and, if he attempts enforcement, injunctive relief can be given in equity to the landowner. *Bruce* v. *Anderson*, 176 Mass. 161. *Brooks* v. *Twitchell*, 182 Mass. 443, 444.

The landowner also under such circumstances can compel a discharge of the lien shown by the record in the registry of deeds if upon request the plaintiff refuses to act. *Sawyer* v. *Cook*, 188 Mass. 163. The condition of the bond is that "if the said principal obligor shall, within thirty days after the final judgment . . ., pay to the party claiming the same [lien] the sum of $500, . . . or so much of said sum as may be necessary to satisfy any amount for which such property may be found to be subject to such lien in such suit, then this obligation shall be void." But there is no requirement that the lien shall be dissolved before the obligation attaches, and, having delivered the bond instead of filing it in the registry, and without obtaining any discharge of the lien, and thirty days having expired after the entry of final judgment, the trial judge correctly ruled that the action could be maintained. *Wall* v. *Kelly*, 209 Mass. 370, 372, and cases cited.

Exceptions overruled.

EDWARD H. R. GREEN & others, trustees, *vs.* JAMES A. KELLEY & another.

Bristol. October 22, 1917. — December 31, 1917.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Legitimacy. Devise and Legacy. Words, "Lineal descendants."

The will of a testatrix gave the residue of her property, upon the termination of a life interest, to the "lineal descendants then living" of G H, the grandfather of the testatrix. It appeared that one of the grandchildren of G H whose issue were entitled to share in the gift left one son born in Michigan in lawful

wedlock and two other sons born in Indiana and remaining domiciled there, with whose mother the grandchild of G H went through a form of marriage, while his first marriage remained in force, which but for such former marriage would have been valid, and that the mother of the two last mentioned sons had no knowledge until after their birth of any impediment to her marriage with their father and had no reason to believe that he had contracted a former marriage, that a statute of Indiana, in force when the two Indiana sons were born and still in force, provided that "When either of the parties to a marriage void, because a former marriage exists undissolved, shall have contracted such void marriage in the reasonable belief that such disability did not exist, the issue of such marriage begotten before the discovery of such disability by such innocent party, shall be deemed legitimate." It further appeared that these three sons of the grandchild of G H were living at the time of the death of the beneficiary for life. *Held*, that the "lineal descendants then living" of G H must be those recognized as such by the law of this Commonwealth, that by such law the *status* of the sons of the grandchild as to legitimacy was dependent upon the law of their domicil unless that was contrary to the statute law or the public policy of this Commonwealth, which the statute of Indiana quoted above clearly was not, and that this law of their domicil showed that the two Indiana sons were legitimate, so that the three sons of the grandchild of G H were entitled to share equally as his lineal descendants.

APPEAL by James A. Kelley of New Albany, Indiana, and Charles B. Kelley of Salem, Indiana, as alleged beneficiaries under a trust created by the will of Sylvia Ann Howland, late of New Bedford, from a decree of the Probate Court for the county of Bristol ordering a distribution of the trust fund among the lineal descendants of Gideon Howland, late of Dartmouth, who were living on July 3, 1916, and excluding the petitioners as being persons not entitled to share as such lineal descendants.

A previous decision of this court upon the petition for the decree of distribution appealed from is reported *ante*, 537.

The case came on to be heard by *Crosby*, J., who at the request of all the parties reserved it upon an agreed statement of facts, including the facts stated in the opinion, for determination by the full court.

The case was submitted on briefs.

O. S. Cook, M. R. Brownell & F. H. Taber, for the respondents James A. and Charles B. Kelley.

M. R. Hitch, for the respondent Frank H. Kelley.

RUGG, C. J. This case relates to the distribution of the residue of the portion of the estate of Sylvia Ann Howland which would have been paid to Joseph H. A. Kelley had he been living. He entered into a legal marriage in Michigan before 1870 with a

woman still living, where Frank H. Kelley, the issue of that marriage was born. Joseph deserted his Michigan wife, while that marriage was in full force and, without obtaining a divorce, settled in Indiana, where in 1876 he went through the form of marriage, which would have been valid but for his Michigan marriage, with one Rosalena Cunningham. The issue of that alliance, born and still domiciled in Indiana, were James A. Kelley and Charles B. Kelley, who were acknowledged by their father as his sons and were supported and maintained by him. Their mother had no knowledge until after their birth of any impediment to her marriage with Joseph and had no reason to believe that he had contracted a former marriage. She and Joseph continued to reside in Indiana and to be subject to its laws until his death in 1899. There was a statute of Indiana at the time of the birth of the sons and since, to the effect that "When either of the parties to a marriage void, because a former marriage exists undissolved, shall have contracted such void marriage in the reasonable belief that such disability did not exist, the issue of such marriage begotten before the discovery of such disability by such innocent party, shall be deemed legitimate." Gen. Laws of Indiana, 1873, c. 43, § 3. The question is, whether the sons born in Indiana are entitled to share with the son born in Michigan in the property devised by Sylvia Ann Howland, late of New Bedford in this State, who died in 1865. She provided by will that at the termination of a life estate, now at an end, the residue of her property should be distributed and divided "to and among all the lineal descendants then living of my grandfather, Gideon Howland . . .", who died in 1823. Joseph H. A. Kelley was a lineal descendant of Gideon Howland. It is conceded that his Michigan son is one of the lineal descendants of Gideon Howland. The point to be decided is whether his Indiana sons also come rightly within that class.

It is clear that, if the form of marriage between Joseph H. A. Kelley and Rosalena Cunningham had occurred in Massachusetts, and they had lived here and their children had been born here, they would not be the legitimate children of their father, and hence not lineal descendants of Gideon Howland. There is no statute of this Commonwealth which goes far enough to permit that. But it is indubitable that, under the law of Indiana in force at the time of their birth and since, the sons of the void marriage

of Joseph with Rosalena Cunningham are the legitimate children of their father. That is the unmistakable import of the Indiana statute. *Binns* v. *Dazey*, 147 Ind. 536, 539. That law fixes the *status* of the sons, because their parents and the sons were domiciled in that State. The *status* of a person as to legitimacy depends upon the law of his domicil. It was said in *Ross* v. *Ross*, 129 Mass. 243, 246, 247, in an exhaustive opinion by Chief Justice Gray, reviewing all previous decisions, "the *status* or condition of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicil which creates the *status*, at least when the *status* is one which may exist under the laws of the State in which it is called in question, and when there is nothing in those laws to prohibit giving full effect to the *status* and capacity acquired in the State of the domicil." *Houghton* v. *Dickinson*, 196 Mass. 389. *Irving* v. *Ford*, 183 Mass. 448. Such *status* is recognized according to the principles of international law in other countries and States unless contrary to the positive law or to public policy of the sovereign power where it is drawn in controversy or so repugnant to good morals as to be improper to recognize. *Adams* v. *Adams*, 154 Mass. 290, 293. This rule prevails generally.

Removal of the obstacles to the legitimation of innocent children, who have no responsibility for the circumstances of their birth, and thus ameliorating some of the apparent harshness of the common law, has been the progressive policy of our law as illustrated by statutes and decisions. See *Loring* v. *Thorndike*, 5 Allen, 257, and *Monson* v. *Palmer*, 8 Allen, 551, where some of the statutes are reviewed.

It is not contrary either to the statute law or the public policy of this Commonwealth that the children of a marriage, bigamous on the part of one parent but innocent on the part of the other, should be declared legitimate to some extent and under some circumstances. There is no express prohibition of such recognition in our statutes. There is no intimation of the inhibition of such recognition in any of our decisions. It was early provided by statute that in proceedings for the dissolution of a marriage, void on account of prior marriage of either party, if it appeared that the second marriage was contracted in good faith by both parties and in the full belief that the former husband or wife was dead, the

issue of the second marriage begotten before the commencement of the suit should be deemed to be the legitimate issue of the parent capable of contracting the marriage. Rev. Sts. c. 76, § 23. R. L. c. 151, § 14. This was enlarged by St. 1902, c. 310, so that when a marriage was declared void by reason of a prior marriage of either party, the issue of such marriage would be the legitimate offspring of the party capable of contracting the marriage when that parent alone believed that the former husband or wife was dead, or that the former marriage was void or was dissolved by divorce. Manifestly even this statute does not go so far toward removing the stigma of bastardy from the issue of a void marriage as does the statute of Indiana here applicable. For example, it leaves such issue helpless in this regard after the death of either parent. *Rawson* v. *Rawson*, 156 Mass. 578. But it recognizes the humane spirit of statutes having this general purpose. That there is nothing contrary to good morals in the enactment of such statutes is too clear for discussion.

The will of the testatrix gave the residue of her property, upon the termination of the life estate, to the "lineal descendants then living" of her grandfather. This will speaks from her death, which occurred in 1865. "Lineal descendants" means the legitimate immediate and remote progeny in direct line. These words of description in the will lay down the general rule for the ascertainment of the beneficiaries; but they do not completely and accurately define how the *status* is to be created which confers the capacity to share the benefaction. They do not prescribe how lineal descendants shall be determined. Therefore the testatrix doubtless intended by those words that only those who would be the lawful issue of her grandfather according to the law of Massachusetts should be participants in her bounty. But these words do not mean that those who are lineal descendants must be ascertained on the footing that all claimants to be such were born and had always lived in this Commonwealth as their domicil of origin and residence, no matter where born and domiciled in fact. If that had been the purpose of the testatrix, apt words to that end would have been used. The law of Massachusetts recognizes that legitimacy ordinarily is a *status* dependent upon the law of the domicil of the person in question. The lineal descendants of any resident of Massachusetts, according to its law, are those who by

the law of the State of their domicil of origin and residence are the legitimate issue of that person. The law of this Commonwealth does not require that the *status* of a citizen of a foreign jurisdiction as to legitimacy necessarily or commonly must be settled according to the law of Massachusetts upon that subject as to its own citizens, rather than by the law of their own home. *Ross* v. *Ross*, 129 Mass. 243, 267. This is the law of most other jurisdictions. *In re Goodman's Trusts*, 17 Ch. D. 266. *Andros* v. *Andros*, 24 Ch. D. 637. *In re Grey's Trusts*, [1892] 3 Ch. 88. *Moore* v. *Saxton*, 90 Conn. 164. *Mund* v. *Rehaume*, 51 Col. 129, 136. *Dayton* v. *Adkisson*, 18 Stew. 603. *Miller* v. *Miller*, 91 N. Y. 315. *Fowler* v. *Fowler*, 131 N. C. 169.

Since the sons of the Indiana marriage are the legitimate issue of their father according to the law of the State of their birth and domicil, they possess that *status* which must be recognized in this Commonwealth. They are thus lineal descendants of Gideon Howland by reason of being the legitimate sons of their father. As such they are entitled to share in the estate of the testatrix.

The decree is to be modified so that in substance the distributive share to which Joseph H. A. Kelley would have been entitled, if living, is to be divided equally between Frank H. Kelley, James A. Kelley and Charles B. Kelley.

So ordered.

INDEX.

ABATEMENT.

Suit in equity for a reformation of a lease of the basement of a building and an abatement of the rent. *Arafe* v. *Howe*, 46.

In an election petition brought under St. 1914, c. 783, § 10, charging a violation of the provisions of the corrupt practices act, a plea in abatement, setting up a defence that the subpoena had been made returnable in fifteen days instead of fourteen days after the filing of the petition, was held to be within the jurisdiction of the Superior Court, and not to be open upon a petition for a writ of prohibition, filed a few days after the plea. *Ashley* v. *Three Justices of Superior Court*, 63.

Of a tax, see that subtitle under TAX.

ACTIONABLE TORT.

Under the agreement of a corporation conducting a private hospital with a woman patient, who was about to have an operation performed there by her own surgeon after being etherized by her family physician, where, after the operation was performed and while the patient still was unconscious under the influence of ether, one of the two hospital nurses, who were present during the operation and assisted in carrying her to her room, forcibly pulled off a valuable ring from the patient's finger and stole it, it was held that there was a violation by the corporation of its duty to the patient under its contract, for which the patient might hold it liable in an action of tort. *Vannah* v. *Hart Private Hospital*, 132.

One, who serves on the employer of a workman a notice of a supposed assignment of wages by the workman, which in fact was made by a different person of the same name, and on being informed by the workman of the mistake unjustifiably refuses to withdraw the notice and thereby causes the workman's discharge, is liable to the workman in an action of tort for the damages resulting from this unlawful interference with his employment. *Doucette* v. *Sallinger*, 444.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

AGENCY.

Existence of Relation.

Where a city hires from a master teamster horses, a cart and a driver to carry material from one place to another as the officers or servants of the city may

direct, the driver being left to deal with the horses in his own way, the driver is not in the employ of the city within the meaning of St. 1913, c. 807, § 6. *Clancy's Case*, 316.

Where, at the trial of an action against two partners for personal injuries sustained by the plaintiff from being run into when he was riding a bicycle on a highway by a motor truck belonging to the partnership and negligently driven by one of the defendants, there was evidence on the question, whether one of the partners who in the absence of his partner was driving the truck, was using it solely for pleasure driving, it was held that rulings, that there was no evidence that at the time of the accident the partner driving the truck was acting within the scope of the partnership business and that there was no evidence that the partner driving the truck was acting as the agent of the other defendant, properly were refused. *Teague* v. *Martin*, 458.

If two partners own as partnership property a motor truck used in the partnership business, and one of the partners gives to the other permission to use the truck for pleasure trips, and if, while the partner to whom this permission is given is using the truck on a pleasure drive not on account of the business of the firm, he negligently runs down a traveller who is riding a bicycle on a highway, the absent partner, who lent his share in the motor truck to his copartner for pleasure purposes, is not liable to the injured traveller, because the loan for the outside purpose did not create an agency. *Ibid.*

Member of the fire department of a city, who was driving a motor car of the department carrying the chief to a fire, was held not to be an employee or agent of the chief, who therefore was not liable for negligence occurring through his negligence. *Skerry* v. *Rich*, 462.

Scope of Authority or Employment.

A workman sixty-four years of age, who was employed in a comb factory and was injured by a fall when he was descending a stairway on the outside of the factory building which led from the second floor to the ground, which, although there were two other ways of going to the street from the second floor, was used by some of the men in the department of the factory in which the employee worked, was held to be entitled to maintain a claim under the workmen's compensation act, the reasonable probability that an employee might be injured in descending such a staircase being a risk of the claimant's employment in that factory. *O'Brien's Case*, 380.

Where a building contract in writing contains a provision that "If any extra work is required, a price for the same must be agreed upon and approved in writing by the architect before such work is begun," the architect has no authority to waive the condition precedent of his approval in writing or to bind the owner by any oral order, and the contractor cannot recover from the owner for extra work and disbursements merely agreed to and approved by the architect orally. *Burns* v. *Thorndike*, 552.

Agent's Duty of Fidelity.

It was held that, under the circumstances, a bill in equity might be maintained by a firm who were manufacturers and sellers at retail in various parts of the country of close-fitting petticoats constructed in accordance

with an invention of one of them to restrain two former employees and a third person from interfering with the business of the plaintiffs by making use of the trade secrets and for damages for past interference, it appearing that the acts of the defendants were done with the deliberate purpose of injuring the plaintiff's sale of garments manufactured according to the invention. *Aronson* v. *Orlov*, 1.

Agent's Compensation.

Commission of real estate broker, see appropriate subtitle under BROKER.

Real Estate Broker.

See BROKER.

Employer's Liability.

See that subtitle under NEGLIGENCE.

Workmen's Compensation Act.

See that title.

ALIENATION OF AFFECTIONS.

In an action for enticing and seducing the plaintiff's wife and thereby depriving the plaintiff of connubial consortium, where there is evidence of inclination and opportunity for adultery between the plaintiff's wife and the defendant, the plaintiff may be allowed to prove that, after he had lived apart from his wife for more than a year during a period when the defendant was living in the same house with the plaintiff's wife, the plaintiff's wife had a child. *Negus* v. *Foote*, 375.

In the same case, in addition to the evidence above described, there was evidence that, when the plaintiff's wife was well advanced in pregnancy and the defendant knew her condition, he said, "that he would be very glad to marry her if it was so that he could, if it was so that she could get married," and it was held that the case, including the evidence wrongly excluded, should have been submitted to the jury. *Ibid.*

AMENDMENT.

Of a petition under the corrupt practices act. *Ashley* v. *Three Justices of Superior Court*, 63.

APPEAL.

Under the circumstances a trustee in an action brought by trustee process in the Municipal Court of the City of Boston was held to have no right of appeal to the Superior Court from a judgment against him upon scire facias, issued upon an original judgment affirmed on report of the Appellate Division. *Universal Optical Corp.* v. *Globe Optical Co.* 84.

See also that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PROBATE COURT; WORKMEN'S COMPENSATION ACT.

ARCHITECT.

Where a building contract in writing contains a provision that "If any extra work is required, a price for the same must be agreed upon and approved in writing by the architect before such work is begun," the architect has no authority to waive the condition precedent of his approval in writing or to bind the owner by any oral order, and the contractor cannot recover from the owner for extra work and disbursements merely agreed to and approved by the architect orally. *Burns* v. *Thorndike*, 552.

ASSESSMENT.

See Tax.

ASSIGNMENT.

An assignment in writing under seal by a dealer in butter, eggs and similar products, as security for the payment of certain promissory notes of such dealer, of "all our book accounts which are now due or which may become due, at any time, until our seven promissory notes of even date . . . are paid as stipulated," passes no title or right as against the trustee in bankruptcy of the assignor to any account not due at the time of the assignment. *Taylor* v. *Barton Child Co.* 126.

Where a lessor of land sells and conveys the land subject to the lease, with no reservation of the rent, the grantee by force of the conveyance becomes entitled, as a part of the realty, to receive all rent thereafter accruing, no attornment being necessary to create privity of estate between the grantee of the lessor and the lessee. *Taylor* v. *Kennedy*, 390.

A conveyance of land subject to a lease operates as an assignment of the lease and not merely as a grant of the reversion, and, if the lessee is sued by the grantee of the land on his covenant in the lease to pay rent, he cannot set up in defence an oral agreement between the original lessor and his grantee whereby such lessor is given the right to receive the accruing rent until the end of the term. *Ibid.*

One, who serves on the employer of a workman a notice of a supposed assignment of wages by the workman, which in fact was made by a different person of the same name, and on being informed by the workman of the mistake unjustifiably refuses to withdraw the notice and thereby causes the workman's discharge, is liable to the workman in an action of tort for the damages resulting from this unlawful interference with his employment. *Doucette* v. *Sallinger*, 444.

In such an action it appeared that the plaintiff was discharged by his employer under a rule, that "any employee executing an assignment of wages will be liable to immediate discharge," and it was held that the presiding judge rightly refused to rule at the defendant's request that the defendant "is not bound by the rule unless it is proven that he had notice of the existence of the rule or reasonable cause to believe that such a rule existed." *Ibid.*

ATTACHMENT.

Suit in equity to restrain the enforcement of a bond to dissolve an injunction in another suit in equity. *Kirby* v. *Donovan*, 86.

The validity of an attachment of real estate is not impaired by the fact that the attaching officer in his return made a description of the property by metes and bounds and called the proceeding a "special attachment." *Cunningham* v. *Bright*, 385.

An attachment of land as the land of W standing in his name as trustee, where it appears the W held the land under an instrument creating a real estate trust with the interests of the beneficiaries represented by certificates, that all the certificates were indorsed to W, that nobody else had paid anything for them and that they were treated by him as his own, is a valid attachment. *Ibid.*

ATTORNEY AT LAW.

Disbarment.

A suit in equity, begun by a common law writ, cannot be maintained for the disbarment of an attorney at law. *Philbrick* v. *Creed*, 382.

As a Witness.

A single justice presiding at the trial before a jury in the Supreme Judicial Court, on an appeal from a decree of the Probate Court allowing the will of a woman, of issues relating to the execution and validity of the will, in the exercise of his discretion may permit an attorney at law who drew the will and who made the opening statement to the jury in behalf of the proponent of the will to testify as a witness for the proponent, although such practice is not to be commended. *Holbrook* v. *Seagrave*, 26.

At the trial above described, there was no issue framed, and the contestants did not ask for any rulings, with reference to the conduct of the attorney who drew the will, on the theory that he was acting as agent for the chief beneficiary; and the presiding justice was held properly to have instructed the jury that no question arose as to whether the will was procured to be made by the attorney. *Ibid.*

Permitting associate counsel for the plaintiff to testify as an expert as to the law of another State, although he knew that law only by investigation and study, was held with some hesitation not to have been reversible error. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

At the trial of a controversy between the proponent of a will, who was the husband of the alleged testatrix and was made the residuary legatee by the proposed will, and the heirs at law of the signer of the instrument, who was alleged by the contestants to have been of unsound mind, an attorney at law, who did not draw the alleged will but had acted as the legal adviser of the alleged testatrix, properly may be permitted to testify as a witness for the contestants, against the objection of the proponent of the will, that "two or three years ago he had a conversation with the testatrix when she came to consult him relative to difficulties" with her husband and may tell what she said to him in that conversation. *Panell* v. *Rosa*, 594.

At the trial described above, certain testimony of the same witness relating

to a conversation between himself and the husband was held to have had no bearing upon the question of the soundness of mind of the deceased wife and to have been immaterial, so that its admission was harmless error under St. 1913, c. 716, § 1, and that it therefore afforded no ground for sustaining an exception. *Panell* v. *Rosa*, 26.

ATTORNMENT.

Where a lessor of land sells and conveys the land subject to the lease, with no reservation of the rent, the grantee by force of the conveyance becomes entitled, as a part of the realty, to receive all rent thereafter accruing, no attornment being necessary to create privity of estate between the grantee of the lessor and the lessee. *Taylor* v. *Kennedy*, 390.

AUDITOR.

See appropriate subtitle under PRACTICE, CIVIL.

AUTOMOBILE.

See MOTOR VEHICLE.

BANK.

Certain agreement under which a bank, as the means of advancing money to a dealer to pay for an importation of hides, purchased the hides in its own name directly from the foreign seller and delivered them to the dealer was held to create a valid trust so that the dealer held the hides with the obligations incidental to the fiduciary relation. *Peoples National Bank* v. *Mulholland*, 152.

In the case above described it appeared that a separate deposit had been made by the dealer of the proceeds received from sales of a part of the commingled goods to a certain corporation, and it was held that this separate deposit stood on the same footing as the unsold part of the commingled goods and was impressed with a like trust for the benefit of the plaintiff. *Ibid.*

In the same case it was held that there had been a sufficient tracing of the hides of the bank into the commingled mass to establish a lien for the bank's claim, and, a part of the mass having been sold and a part destroyed by fire, the bank's lien attached to all that remained of the lot. *Ibid.*

In the same case it was held that such commingling was done by the dealer in disregard of its obligation to the bank and was a breach of its fiduciary duty. *Ibid.*

If a conservator makes a deposit in a bank in his own name as conservator for his ward, the bank is accountable to him and not to his ward for the amount of the deposit. *Day* v. *Old Colony Trust Co.* 225.

SAVINGS BANK, see that title.

BANKRUPTCY.

An assignment in writing under seal by a dealer in butter, eggs and similar products, as security for the payment of certain promissory notes of such dealer, of "all our book accounts which are now due or which may become

due, at any time, until our seven promissory notes of even date . . . are paid as stipulated," passes no title or right as against the trustee in bankruptcy of the assignor to any account not due at the time of the assignment. *Taylor* v. *Barton Child Co.* 126.

In a suit in equity by a trustee in bankruptcy of a business corporation against a trust company to set aside as an unlawful preference an assignment by the bankrupt one month before it was adjudged a bankrupt of certain accounts to the defendant as additional security for the payment of a demand promissory note of the bankrupt payable to the defendant, findings by the trial judge, it was held, could not be reviewed on an appeal from a final decree for the plaintiff, in the absence of a report of the evidence on which the findings were based. *Abele* v. *Beacon Trust Co.* 438.

In the same case it also was held that an inference of the judge, that "the trust company had reasonable cause to believe that a preference was being effected," was warranted by other facts found by him. *Ibid.*

In the same case it was held that the findings stated above were sufficient to support a decree setting aside the assignment without the plaintiff showing that the bankrupt intended a preference or that the defendant believed that such a preference was intended. *Ibid.*

BILLS AND NOTES.

Consideration.

In an action against a husband and wife jointly on a promissory note signed by both of them as makers, where it appears that the wife signed the note as a joint and several maker with full knowledge of its tenor and that the note was given for money lent by the plaintiff to the husband to be secured by a mortgage of the husband's real estate, a good consideration for the wife's promise is shown. *Willard* v. *Greenwood*, 549.

Validity.

In an action on a promissory note the defence of fraud in the making of the note is not open to the defendant unless it is set up in the answer. *Whitman* v. *Fournier*, 93.

Forgery.

In an action by a fraternal beneficiary corporation against a savings bank for the amount of deposits drawn out by the plaintiff's treasurer upon forged orders, remissness of the plaintiff's auditors, in failing to discover that the treasurer was misappropriating the funds of the corporation or was obtaining money from the savings bank on forged orders, was held not to be evidence that the corporation participated in the treasurer's fraud and not to require a finding that the corporation was so negligent in failing to discover the fraud as to lose its right to recover the amount paid by the bank on the forged orders. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

Indorsement.

In an action on a promissory note against the maker, where the defendant had admitted that he signed the note, but there was no evidence in regard

to the indorsement of the note by the third person to whom it was made payable, and the note was introduced in evidence with a signature upon its back purporting to be that of the payee, it was said that if nothing more had appeared the presiding judge should have ordered a verdict for the defendant, as an indorsement does not prove itself. *Whitman* v. *Fournier*, 93.

In the case stated above where the defendant read to the jury the plaintiff's answers to interrogatories propounded to him by the defendant, in which the plaintiff answered, "There is no indorsement by [the payee] to me. The note in question was indorsed [by the payee] in blank before maturity and for value paid [by a certain firm who] assigned the same to me," it was held that a verdict should not have been ordered for the plaintiff because the defendant had not precluded himself from arguing to the jury that the answer was not true. *Ibid.*

Identity of Instrument.

In an action upon a promissory note it was stated in the bill of exceptions that the note produced "was printed upon yellow paper," whereas in answer to an interrogatory the plaintiff had stated that the note was not printed on yellow paper, and the defendant contended that he was entitled to go to the jury on the question of the identity of the note, but it was held that no question of identity was open to the defendant, as he had admitted on the witness stand that the note produced was signed by him and that it was the note described in the declaration. *Whitman* v. *Fournier*, 93.

Surety.

See that title.

BOND.

Probate Bond.

Upon a bill for institutions by a trustee relative to payment of expenses incidental to the recovery of funds misappropriated by his predecessor as trustee, it was held that the expenses incidental to the prosecution of the action on the probate bond against the defaulting trustee and his surety could not be charged to income, because of the theory of the law that the taxable costs prescribed by the Legislature and recoverable in such an action on the bond were a full indemnity for these expenses. *Cogswell* v. *Weston*, 219.

To dissolve Attachment or Injunction or Lien.

In a suit in equity to enjoin the defendants from enforcing a bond, given to dissolve an injunction in another suit and signed by the plaintiff as principal and by a corporation as surety, it does not help the plaintiff to show that the bill in equity on which the injunction was granted was amended without notice to the surety, if the amendment was immaterial because the injunction was granted on the allegations of the original bill as it stood before the amendment. *Kirby* v. *Donovan*, 86.

An action on a bond for $4,000 given to dissolve a mechanic's lien may be brought in a district court whose jurisdiction is limited to claims of $1,000 if the *ad damnum* set forth in the writ is only $1,000. *Massasoit-Pocasset National Bank* v. *Borden*, 581.

In the action above described it was said that there is no statute nor any principle of public policy that requires an inferior court with a pecuniary limit to its jurisdiction, upon proof of the breach of a bond on which an action is brought, to enter judgment for the full penalty of the bond in excess of the *ad damnum* of the writ which is all that the plaintiff asks for. *Ibid.*

A bond to dissolve a mechanic's lien given before January 1, 1916, under R. L. c. 197, § 28, as amended by St. 1906, c. 223, and St. 1909, c. 237, which is not recorded in the registry of deeds within ten days after its approval and which therefore is not good as a statutory bond, if executed under seal and delivered and accepted, is good at common law, and the obligee in an action upon it can recover the amount of his unpaid debt. *Chertok* v. *Morang*, 598.

In an action on such a bond it was said that it was not necessary to determine, whether a municipal court in which the proceedings to enforce the mechanic's lien were brought had jurisdiction to make an order dissolving the lien upon the filing of such a common law bond, because the obligee of the bond, after having recovered in his action upon it the full amount of his debt, would not be permitted to enforce his mechanic's lien. *Ibid.*

What Law governs.

As to action of a judge presiding at the trial of an action upon a bond of indemnity delivered in the State of New York, in permitting associate counsel for the plaintiff to testify as an expert witness as to the law of New York although he knew that law only by investigation and study, never having practised in that State, it was held with some hesitation under the circumstances of the trial that it could not be said that the determination by the judge of the preliminary question of the qualification of the expert was clearly wrong and that therefore it must stand. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

In the case above described it also was held that it was not necessary to consider whether the evidence in the case would warrant a finding that the signature in the firm name by one of the partners was ratified by his copartner and was binding under the law of this Commonwealth, the bond having been delivered in the city of New York where the persons concerned carried on business, so that it was to be assumed that the liability of the surety was to be determined by the law of New York. *Ibid.*

BOOK ACCOUNTS.

An assignment in writing under seal by a dealer in butter, eggs and similar products, as security for the payment of certain promissory notes of such dealer, of "all our book accounts which are now due or which may become due, at any time, until our seven promissory notes of even date . . . are paid as stipulated," passes no title or right as against the trustee in bankruptcy of the assignor to any account not due at the time of the assignment. *Taylor* v. *Barton Child Co.* 126.

BREAKING AND ENTERING.

It was held to have been proper for the judge presiding at the trial of two defendants upon a joint indictment for breaking and entering a dwelling house in the night time with the intent to commit larceny therein and for the larceny therein of divers articles of jewelry and precious stones to admit, under certain instructions limiting its use, evidence to show that neither of the defendants had worked for a year before their arrest and that neither of them had any visible means of support, and that, when arrested about two months after the burglary, they had in their possession money and jewelry, although none of the articles so found were identified as the property stolen or were shown to have come from the house that the defendants were charged with breaking and entering. *Commonwealth* v. *Coyne*, 269.

BRIDGE.

Action against a railroad corporation for damages resulting from the plaintiff's horse being frightened by a staging swung under a bridge over a highway for the use of persons painting the bridge. *Hanley* v. *Boston & Maine Railroad*, 365.

The provision of St. 1898, c. 578, § 11, relieving street railway corporations from all obligations as to surface repairs of streets, roads and bridges unless the obligation to do so had been imposed in a grant of original location, was not repealed nor superseded by St. 1911, c. 552, so as to revive such an obligation on the part of the Globe Street Railway Company. *Fall River* v. *Public Service Commissioners*, 575.

BROKER.

Commission.

In an action by a real estate broker to recover a commission for procuring a purchaser for the defendant's farm, it was held that the judge, who at the request of the defendant had given a ruling that the plaintiff could not recover unless by the time agreed he produced "a customer ready, able and willing to enter into a binding, that is, written, contract to take the property," was right, under the circumstances disclosed by the evidence, in modifying the ruling by stating that he did not intend to rule "that the actual physical presence of the customer at the time and place was necessary." *Leland* v. *Barber*, 144.

It is not a universal rule that a real estate broker cannot earn a commission for procuring a purchaser for his customer's land without obtaining a binding contract signed by the purchaser. The signature of the purchaser is only a condition precedent to the payment of a commission when it is made so expressly by the broker's contract of employment or such a condition fairly is to be implied from that contract. *Ibid.*

Where the owner of land authorizes a real estate broker to sell it for him for $14,000 or $13,000 or possibly for $12,000 in cash above a bank mortgage of $4,500, and the broker fails to obtain a purchaser ready to pay the required price but produces two proposed purchasers each of whom is able and willing to pay for the land $11,000 in cash above the mortgage, and

the landowner refuses these offers, but afterwards through another broker sells the land to another purchaser, not procured directly or indirectly by the first broker, for the price of $11,000 in cash above the mortgage, which he formerly had refused, all the transactions being in good faith, the first broker is entitled to no commission. *Bowes* v. *Henry*, 341.

If a real estate broker is employed as the exclusive agent of a landowner to sell a certain parcel of land, and if, after the broker has reported to the landowner an offer from a proposed purchaser, which the landowner refuses, the landowner without the knowledge of the broker makes an oral agreement with the proposed purchaser to sell the land to him at a higher price, which is reduced to writing but is signed only by the landowner and which the proposed purchaser afterwards refuses to carry out at the price named, because the parcel contains less land than he thought it did, and brings an action against the landowner for $500 which he had deposited under the oral agreement, the broker is not entitled to a commission. *Bruce* v. *Meserve*, 463.

BUILDING INSPECTOR.

Application, operation and constitutionality of the provisions of St. 1913, c. 655, relating to the regulation of the maintenance and use of tenement houses, see BUILDING LAWS.

BUILDING LAWS.

It was assumed, but without so deciding, that an appeal to a judge of the Superior Court from an order of a building inspector under St. 1913, c. 655, § 55, applying for an order forbidding the enforcement of the order of the inspector is a "civil cause" within the meaning of R. L. c. 173, § 106, so that it may be brought before this court upon exceptions alleged in the Superior Court under that statute. *Stevens, landowner*, 368.

The provision of the building laws contained in St. 1913, c. 655, § 20, as to tenement houses is a police regulation for the protection from fire of the lives of human beings within the constitutional power of the Legislature. *Ibid.*

One, who under St. 1913, c. 655, § 55, has appealed to a judge of the Superior Court from an order of a building inspector applying for an order forbidding the enforcement of the order of the inspector, cannot be heard in that proceeding to contend that the statute of which he is taking advantage is unconstitutional in not providing for a trial by jury as to the establishment of the fundamental facts on which the jurisdiction of the inspector rested. *Ibid.*

Whether a person who has taken such an appeal to a judge of the Superior Court, if afterwards a criminal prosecution or proceedings in equity should be instituted against him for failure to comply with the requirements imposed by the order of the building inspector, would have a right to a trial by jury, here was referred to as a question that was not before the court. *Ibid.*

The statute quoted above is not unconstitutional in its operation upon the landowner in failing to provide for a trial by jury in connection with the review by a judge of the Superior Court of the order of the inspector. *Ibid.*

On such an appeal to a judge of the Superior Court applying for an order forbidding the enforcement of an order of a building inspector, a finding of the

judge, as to a contention of the landowner that the structure in question, instead of being a tenement house, consisted of two houses, was that the building was one tenement house and this finding of fact, it was held, could not be pronounced erroneous. *Stevens, landowner*, 368.

In the same case as to a contention by the landowner that a requirement of the order of the building inspector, that there should be an electric light at each landing of the front and rear stairways of the building, which should be kept lighted throughout the night, was unreasonable, it was held that this was a matter of detail largely discretionary in which the decision of the inspector when approved by a judge of the Superior Court would not be disturbed. *Ibid.*

CAMBRIDGE.

Under the provisions contained in St. 1915, c. 267, Part III, § 7; Part I, § 4, an ordinance of the city of Cambridge, which was in force when that city adopted the Plan B form of government, fixing the salary of the mayor under the former charter at $3,500 a year, is in conflict with the power given to the city council by the new charter and does not impair the validity of an ordinance, passed by such city council four months after the adoption of the new charter, fixing the salary of the mayor under that charter at $5,000 a year. *Mayor of Cambridge* v. *Cambridge*, 249.

In an action to enforce payment to the Mayor of Cambridge of the salary of $5,000 per year in accordance with an ordinance passed on March 21, 1916, under the circumstances it was held, that the mayor was entitled to interest on three months' salary from April 10, 1916, and to interest on the salary for each of the other months from the tenth day of the month next succeeding the month for which the salary became due. *Ibid.*

CAPITAL AND INCOME.

Upon a bill for instructions as to the provisions of the will of Edwin Ginn, relating to the World Peace Foundation, it was held that in reckoning the amount of income payable to the World Peace Foundation in any year, the entire proceeds of the sales of vacant real estate should be treated as a part of the principal of the trust property and should not be apportioned between principal and income. *Parkhurst* v. *Ginn*, 159.

Upon the same bill for instructions it was held that, the will under interpretation containing no provision otherwise, the legacy and succession taxes on the several annuities which the trustees were directed to pay were payable out of the capital fund of the trust. *Ibid.*

Upon the same bill for instructions it was held that the ordinary annual taxes were to be paid as a part of the expenses of the trust to be deducted before the net income could be ascertained. *Ibid.*

Upon the same bill for instructions it was held that the premiums on the bonds given by the trustees, as authorized to be paid by R. L. c. 150, § 15, should be paid out of income and not out of principal. *Ibid.*

Where the two trustees holding a trust fund created by will were also the beneficiaries for life of the trust, being entitled to the income of the trust in equal shares, and where one of these trustees wilfully misappropriated a large amount of the trust property and his co-trustee, who was shown to

have been culpably negligent in permitting the misappropriation to occur, died, a new trustee was instructed that he should pay the general expenses incident to the investigation and recovery of misappropriated funds and real estate fraudulently sequestered out of income in his hands which under the terms of the trust would go to the former trustees as beneficiaries, instead of from the capital of the trust which belonged to blameless remaindermen. *Cogswell* v. *Weston*, 219.

CARRIER.

Actions for personal injuries or death of passengers caused by negligence of street railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

CERTIORARI.

Petition for a writ of certiorari is the proper remedy to correct essential errors of law apparent on the record of proceedings on a petition under Sts. 1911, c. 624, § 1; 1915, c. 251, of a person holding an office classified under the civil service rules for review of the action of an officer or board in removing him, if such action deprives the petitioner of substantial rights. *Commissioner of Public Works of Boston* v. *Justice of Municipal Court of Dorchester*, 12.

On the findings of the trial judge who heard petitions for writs of certiorari brought by the commissioner of public works of the city of Boston against a justice of the Municipal Court of the Dorchester District of that city to quash orders made by that judge upon such reviews, reversing orders made by the petitioner abolishing the office of supervisor of permits of the public works department and the offices of division engineer and superintendent of main drainage of the sewer and water service of the public works department, it was held that the decision of the judge that the orders of removal were made without proper cause and in bad faith showed no error of law and was not reviewable on a writ of certiorari. *Ibid.*

In the case described above, it was pointed out that the decision of this court upon the record presented was not to be taken as an intimation that either the petition or the return was correct in form, both of them containing defects to which no objection had been raised. *Ibid.*

CHARITY.

A corporation named the World Peace Foundation, organized under the laws of this Commonwealth, which was a beneficiary under the will of Edwin Ginn, who had organized it, was held to be a charitable society or institution within the meaning of St. 1912, c. 678, § 1, and St. 1909, c. 490, Part I, § 5, and accordingly the passing of property to it by will was held not to be subject to a legacy and succession tax. *Parkhurst* v. *Treasurer & Receiver General*, 196.

Whether the passing of a gift by will to a corporation is subject to a legacy and succession tax, or whether it is exempt from such a tax as the passing of a gift to a charitable society or institution, depends on the purposes and work of the corporation at the time of the death of the testator, when his will took effect after it was proved, and subsequent acts of the corporation only can

be material so far as they tend to show what the character of the corporation was at that time. *Parkhurst* v. *Treasurer & Receiver General*, 196.

CHILD.

As to negligence of one in charge of a child, see appropriate subtitle under NEGLIGENCE.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE.

Provision of St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, as to the finality of the decision of the trial judge on a petition of a person holding an office classified under the civil service rules of the Commonwealth to the police, district or municipal court within the judicial district where such person resides for review of the action of an officer or board in removing the petitioner, means that the justice's findings of fact shall be final and binding on the parties. *Commissioner of Public Works of Boston* v. *Justice of Municipal Court of Dorchester*, 12.

Such provision, however, does not leave the parties without remedy if there are essential errors of law apparent on the record of the proceedings depriving such a party of substantial rights, and a person so aggrieved may maintain a petition for a writ of certiorari to quash such erroneous proceedings. *Ibid.*

On the findings of the trial judge who heard petitions for writs of certiorari brought by the commissioner of public works of the city of Boston against a justice of the Municipal Court of the Dorchester District of that city to quash orders made by that judge upon such reviews, reversing orders made by the petitioner abolishing the office of supervisor of permits of the public works department and the offices of division engineer and superintendent of main drainage of the sewer and water service of the public works department, it was held that the decision of the judge that the orders of removal were made without proper cause and in bad faith showed no error of law and was not reviewable on a writ of certiorari. *Ibid.*

In the case described above, it was pointed out that the decision of this court upon the record presented was not to be taken as an intimation that either the petition or the return was correct in form, both of them containing defects to which no objection had been raised. *Ibid.*

COMPROMISE OF CONTROVERSY CONCERNING WILL.

It was pointed out that a compromise of a controversy concerning a will which the court may authorize under R. L. c. 148, § 15, is not a modification of the will but is merely an agreement of the parties interested, who, if they all are ascertained and in being and of age, can make such an agreement that will be binding irrespective of the statute. *Ellis* v. *Hunt*, 39.

The court has no jurisdiction under R. L. c. 148, § 15, to authorize an executor to adjust by compromise a controversy concerning a will by an agreement

to which trustees to whom property is devised and bequeathed by the will are not parties. *Ellis* v. *Hunt*, 39.

CONFLICT OF LAWS.

The provisions of St. 1911, c. 751, Part I, § 1, doing away with certain defences in actions for personal injuries sustained by employees in the course of their employment, have no application to personal injuries received by an employee outside this Commonwealth. *Cogliano* v. *Ferguson*, 147.

As to action of a judge presiding at the trial of an action upon a bond of indemnity delivered in the State of New York, in permitting associate counsel for the plaintiff to testify as an expert witness as to the law of New York although he knew that law only by investigation and study, never having practised in that State, it was held with some hesitation under the circumstances of the trial that it could not be said that the determination by the judge of the preliminary question of the qualification of the expert was clearly wrong, and that therefore it must stand. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

CONSERVATOR.

Rights and Powers.

Description by CARROLL, J. of the relation of a conservator appointed under R. L. c. 145, §§ 40, 41, as amended by St. 1910, c. 95, to the property of his ward. *Day* v. *Old Colony Trust Co.* 225.

If a conservator makes a deposit in a bank in his own name as conservator for his ward, the bank is accountable to him and not to his ward for the amount of the deposit. *Ibid.*

A conservator, after the death of his ward, has a right to retain the possession or custody of the property of the ward in his hands until his account has been passed upon by the Probate Court. *Ibid.*

Until the amounts due to him for services and expenses have been determined by that court, he may hold possession of the property against the executor of the will of his deceased ward. *Ibid.*

In an action for money had and received brought by a conservator against a trust company, with which, as alleged, he had deposited the money in his own name as conservator for his ward, it was said that a defence that the plaintiff was estopped by his conduct in joining with the executor of the ward's will in a certain petition for partial distribution which mentioned the deposit as a part of the estate, could not prevail, because the plaintiff by joining in the former proceeding had not lost his right to claim the deposit if it stood in his own name and the contract of the defendant was made with him and not with his deceased ward. *Ibid.*

It also was held that the defence of such an estoppel, not being set up in the answer, was not open to the defendant. *Ibid.*

Accounts.

On an appeal from a decree of the Probate Court allowing with certain modifications the accounts of a conservator of the property of a deceased ward, the allowance of which was opposed by the executor of the will of the ward,

Conservator (*continued*).

it was held that the single justice who heard the appeal was right in refusing as matter of law to allow charges of the conservator for services of counsel rendered and expenses incurred after the decree of the Probate Court was made. *Day* v. *Nichols*, 236.

In the same case it was said that the conservator must seek relief by the presentation of a supplemental account in the Probate Court. *Ibid.*

In the same case it was held that such charges could not be allowed as costs and expenses under R. L. c. 162, § 44, because under the circumstances of the case the account allowed was not a final account nor in the nature of a final account. *Ibid.*

In the same case it was held that a finding of a master in regard to the account of the conservator, that it was prudent for the conservator to leave deposited in a trust company uninvested a balance of from $1,200 to $2,000, earning only two per cent, could not be said to be clearly erroneous, where the master also found that the condition of the ward was such that at any time the conservator "might be called upon to defray the cost of doctors, nurses and attendants" and also of the removal of the ward to an asylum and of treatment there. *Ibid.*

In the same case the master found that certain presents of money and furs by the conservator to the persons who had personal custody of the ward were made solely for what the conservator conceived to be the interest and benefit of the ward, that the expense to the estate of the gifts was small and that the results were of inestimable value to the ward, and it was held that the payments for the presents were wise and judicious expenditures of the money of the ward. *Ibid.*

In the same case it appeared that it was necessary for the conservator to attend the funeral of the ward and that he made a charge for expenses incurred in attending the funeral, but there was no evidence to show the amount of such expenses, and it was held that an exception to the master's finding must be overruled. *Ibid.*

In the same case certain charges of the conservator related to the collection by him of money due on a policy of the Massachusetts Hospital Life Insurance Company and it appeared that by the terms of the policy, which was called an "annuity in trust," the principal sum was to be paid "to the said conservator or his successors," and it was held that the collection of the money due on the policy was proper and that all reasonable expenses incidental to its collection were incurred properly by the conservator. *Ibid.*

In the same case the evidence relating to the reasonableness of the charges of the conservator for his own services was not reported, but the master's conclusion of fact, that the charges were reasonable, was in accordance with the evidentiary facts reported by the master and was affirmed by the single justice who heard the case, and it was held that an exception to the finding must be overruled. *Ibid.*

Upon cross appeals taken by an executor and by the conservator of the property of the testatrix from a decree of the Probate Court allowing with certain modifications the account of the conservator, the question of taxable costs rests wholly in the discretion of the single justice who hears the appeals. *Ibid.*

CONSTITUTIONAL LAW.

Unconstitutionality of Separable Portion of Statute.

The portion of the corrupt practices act contained in St. 1914, c. 783, § 10, which in Dinan *v.* Swig, 223 Mass. 516, was held to be unconstitutional and void as in violation of the provisions of the Constitution, which make each branch of the General Court the final judge of the returns, elections and qualifications of its own members, is distinct and separate from the rest of the act and does not affect the validity of the other parts. *Ashley* v. *Three Justices of Superior Court*, 63.

Police Power.

The provision of the building laws contained in St. 1913, c. 655, § 20, as to tenement houses is a police regulation for the protection from fire of the lives of human beings within the constitutional power of the Legislature. *Stevens, landowner*, 368.

Power to regulate Insurance.

St. 1914, c. 464, which in substance prohibits the insertion in a contract of casualty insurance made after that statute took effect of a condition that the insured must pay the amount of the loss before liability attaches to the insurer, and which gives to a person injured by fault of the insured in a manner covered by the policy a beneficial interest in the proceeds of the policy and permits him, after he has obtained a judgment against the insured, to maintain a suit in equity in his own name to procure the application of the insurance money to the satisfaction of his judgment, is constitutional. *Lorando* v. *Gethro*, 181; *Williams* v. *Nelson*, 191.

Taxation.

St. 1914, c. 724, relating to an excise tax upon foreign corporations is constitutional and valid. *International Paper Co.* v. *Commonwealth*, 101.

It was said to be manifest that a State is not debarred from imposing an excise upon the granted privilege of being a corporation because the corporation is engaged in interstate as well as intrastate commerce. *Ibid.*

It also was said that it seemed to be indubitable that the use by a State of a percentage on the authorized capital stock of a foreign corporation as the measure of an excise or license fee imposed for permission to such foreign corporation to do an intrastate or local business within its orders is not a decisive element in determining the validity of the imposition of the tax. *Ibid.*

Charter provisions of a foreign corporation, engaged in this Commonwealth in the manufacture of paper, and the facts as to its business here and in other States were held not to make unlawful an excise imposed under St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724, for doing business in this Commonwealth. *Ibid.*

St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724, relating to an excise upon foreign corporations, does not deny to such a corporation equal

protection of the laws under the Fourteenth Amendment of the Constitution of the United States. *International Paper Co.* v. *Commonwealth*, 101.

If the statute imposing an excise on foreign corporations doing business in Massachusetts discriminates in favor of the large and against the small corporations, one of the class of the large corporations cannot be heard to complain of this discrimination by which it is not aggrieved. *Ibid.*

As to a contention that a certain excise imposed upon a certain large foreign corporation was unconstitutional because unreasonable in amount, it was said that the court "know of no principle of law which requires the conclusion that a license fee of that amount is unduly or unreasonably great, to a corporation of such large capital as the petitioner, for the privilege of admission to the local markets of this Commonwealth for the transaction of an intrastate business in the manufacture and sale of an undisclosed quantity of paper of undisclosed value and out of which an undisclosed profit is realized." *Ibid.*

It was held that the objection, that the excise imposed on foreign corporations doing business here by the above described statutes is unconstitutional because it is unreasonable in amount, could not be raised by a foreign corporation which under the circumstances had the option of giving up the local commerce and business if it did not care to prosecute them under the excise imposed. *Ibid.*

Equal Protection of Laws.

The provision of the corrupt practices act contained in St. 1913, c. 835, § 371, as amended by St. 1914, c. 783, § 11, excepting from its operation the elections of town officers in towns of less than ten thousand inhabitants, does not impair the constitutional validity of the act. *Ashley* v. *Three Justices of Superior Court*, 65.

There is nothing in the corrupt practices act that deprives the respondent in an election petition of the equal protection of the laws. *Ibid.*

St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724, relating to an excise upon foreign corporations, does not deny to such a corporation equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. *International Paper Co.* v. *Commonwealth*, 101.

The fact that a foreign corporation doing business in this Commonwealth acquired its real estate in Massachusetts while St. 1903, c. 437, § 75, was in force and before the enactment of St. 1907, c. 578, (now St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724,) does not show that such corporation has been denied the equal protection of the laws by being made subject to the excise imposed by the later statutes. *Ibid.*

If the statute imposing an excise on foreign corporations doing business in Massachusetts discriminates in favor of the large and against the small corporations, one of the class of the large corporations cannot be heard to complain of this discrimination by which it is not aggrieved. *Ibid.*

Property Rights.

Neither the right to hold an elective public office nor the right to vote is a property right within the meaning of the Fourteenth Amendment to the

Constitution of the United States. *Ashley* v. *Three Justices of Superior Court*, 63.

St. 1915, c. 112, purporting to confer on the Land Court jurisdiction under certain circumstances to register the title to a petitioner's land free from equitable restrictions, where the petitioner has paid into court a sum found to be a proper compensation, is unconstitutional and void, because the taking of property for a private purpose without the consent of its owner upon payment of full compensation is a violation of arts. 1, 10 of the Declaration of Rights and cannot be authorized by statute. *Riverbank Improvement Co.* v. *Chadwick*, 242.

Right to Fair Trial.

Violation, at the trial of a complaint under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, of art. 12 of the Declaration of Rights, by permitting the jury to find the defendant guilty of a crime not charged in the complaint. *Commonwealth* v. *LaPointe*, 266.

Trial by Jury.

The provision in regard to trial by jury in the Seventh Amendment to the Constitution of the United States relates only to the courts of the United States. *Ashley* v. *Three Justices of Superior Court*, 63.

Trial by jury is not essential to the due process of law secured by the Fourteenth Amendment to the Constitution of the United States. *Ibid.*

The provisions of the corrupt practices act contained in St. 1913, c. 835, § 497, as amended by St. 1914, c. 783, § 12, considered in connection with the Fortieth Amendment to the Constitution, do not give the respondent in an election petition a constitutional right to a trial by jury thereon. *Ibid.*

Article 15 of the Declaration of Rights does not apply to an election petition under the statute named above; because the right to hold an office to which one has been elected is not "property" within the meaning of the word as used in the Declaration of Rights and a proceeding upon an election petition is not a "suit between two or more persons" in the sense in which those words there are used. *Ibid.*

One, who under St. 1913, c. 655, § 55, has appealed to a judge of the Superior Court from an order of a building inspector applying for an order forbidding the enforcement of the order of the inspector, cannot be heard in that proceeding to contend that the statute of which he is taking advantage is unconstitutional in not providing for a trial by jury as to the establishment of the fundamental facts on which the jurisdiction of the inspector rested. *Stevens, landowner*, 368.

Whether a person who has taken such an appeal to a judge of the Superior Court, if afterwards a criminal prosecution or proceedings in equity should be instituted against him for failure to comply with the requirements imposed by the order of the building inspector, would have a right to a trial by jury, here was referred to as a question that was not before the court. *Ibid.*

The statute quoted above is not unconstitutional in its operation upon the landowner in failing to provide for a trial by jury in connection with the review by a judge of the Superior Court of the order of the inspector. *Ibid.*

Interstate Commerce.

It was said to be manifest that a State is not debarred from imposing an excise upon the granted privilege of being a corporation because the corporation is engaged in interstate commerce. *International Paper Co.* v. *Commonwealth*, 101.

Right to vote and to hold Office.

The provisions of the corrupt practices act impose no unconstitutional limitations upon the right to vote or the right to hold office. *Ashley* v. *Three Justices of Superior Court*, 63.

Establishment of Judicatures and Courts.

The "full power and authority" given to the General Court by c. 1, § 1, art. 3 of the Constitution "to erect and constitute judicatories and courts of record, or other courts," includes by necessary implication the power to fix the territorial limits within which such courts shall exercise jurisdiction and the places at which they shall be held. *Ashley* v. *Three Justices of Superior Court*, 63.

The provision of the corrupt practices act that election petitions shall be entered in the Superior Court in Suffolk County is within the power of the General Court, and the respondent's right under art. 11 of the Declaration of Rights "to obtain right and justice freely" is not impaired thereby. *Ibid.*

For the reason named above it did not become necessary for this court in the present case to consider whether the subject of elections is of a nature so political that the Legislature is unlimited in its power to establish tribunals to deal with questions relating to elections to public office and to define the jurisdiction of such tribunals. *Ibid.*

By an assignment by the Chief Justice of the Superior Court under authority of St. 1914, c. 783, § 10, (*c*) of three judges of that court to hear election cases during the year no new tribunal is created, and the statute does not violate c. 2, § 1, art. 9 of the Constitution, which provides that "All judicial officers . . . shall be nominated and appointed by the Governor, by and with the advice and consent of the Council." *Ibid.*

There is nothing in the corrupt practices act in derogation of the constitutional powers of the Supreme Judicial Court. *Ibid.*

Elections.

There is nothing in the corrupt practices act in conflict with any provision of the Constitution of the United States. *Ashley* v. *Three Justices of Superior Court*, 63.

There is nothing in the corrupt practices act in conflict with the provision of art. 9 of the Declaration of Rights that "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." *Ibid.*

CONTRACT.

What constitutes.

The signing of an agreement in writing to subscribe for the shares of a proposed Massachusetts corporation, which refers to a prospectus, in which was stated certain advice of counsel that a new corporation be formed to take over the property of a certain Virginia corporation, was held not to create a contract of the subscribers with the Virginia corporation or with any of its stockholders. *Jamestown Portland Cement Corp.* v. *Bowles*, 176.

Consideration.

Consideration for negotiable instrument, see appropriate subtitle under BILLS AND NOTES.

Validity.

A contract to pay money after one's own death is valid. *Charron* v. *Day*, 305.

Construction.

Where the parties to a lease have put upon it a certain construction as to the extent of the premises covered by it, which is not contrary to its terms and is not forbidden by any rule of law, both parties will be bound by such construction. *Arafe* v. *Howe*, 46.

Where a depositor in a savings bank assents at the time of his first deposit, in accordance with a notice printed on his bank book, "to all the regulations of the institution," this does not incorporate in his contract with the bank a by-law subsequently adopted, without the knowledge of the depositor, that, "When a deposit book has been lost or destroyed, immediate written notice should be given to the treasurer . . . the corporation will not be responsible for loss sustained, when a depositor has not given notice in writing of his book having been stolen or lost, if payment be made in whole or in part on account of such book on presentation." *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

Construction of contracts of insurance, see appropriate subtitles under INSURANCE.

Construction of lease of land, see appropriate subtitle under LANDLORD AND TENANT.

Performance and Breach.

In an action upon an account annexed for work and materials furnished for a cottage of the defendant, it appeared that in laying the tapestry brick and building the fireplace the plaintiff followed the personal directions of the defendant and that he used ordinary skill, that the fireplace when finished was not a good fireplace and was not constructed in a "workmanlike manner," but that this was due to the failure of the defendant to furnish the plaintiff with adequate plans and necessary materials, and it was held that the plaintiff might recover the value of his work and materials furnished. *Sherman* v *Buffington*, 139.

Negotiations, proposals or schemes, which do not possess the essential elements of a completed contract, cannot be enforced in equity by a bill for specific performance. Nothing short of a completed contract can be made the foundation of such a bill. *Jamestown Portland Cement Corp.* v. *Bowles*, 176.

Performance by a real estate broker of the conditions precedent to earning his commission, see appropriate subtitle under BROKER.

Damages to be assessed for breaches of contracts, see appropriate subtitle under DAMAGES.

Assignment.

An assignment in writing under seal by a dealer in butter, eggs and similar products, as security for the payment of certain promissory notes of such dealer, of "all our book accounts which are now due or which may become due, at any time, until our seven promissory notes of even date . . . are paid as stipulated," passes no title or right as against the trustee in bankruptcy of the assignor to any account not due at the time of the assignment. *Taylor* v. *Barton Child Co.* 126.

Reformation.

Suit in equity to reform a lease of the basement of a business building and for an abatement of the rent. *Arafe* v. *Howe*, 46.

Rescission.

The insured in a policy of endowment insurance after the death of his wife before the expiration of the endowment period cannot maintain a suit in equity to change the binding force of the contract by reason of his own alleged undisclosed mistake in thinking that the policy made the insurance money payable to himself in case he should be living when the thirty year period expired. *Hayes* v. *Penn Mutual Life Ins. Co.* 122.

In such a suit in equity brought by the insured to have the policy cancelled and the amount of the premiums repaid to him, it was held that the plaintiff and his wife, having accepted the policy, could not deprive the insurance company of its rights under it by neglecting to read it, and that it would be inequitable to compel the insurance company to return the premiums. *Ibid.*

In an action by a mason on an account annexed for work and materials furnished for a cottage of the defendant, where there had been a special contract between the parties for doing certain mason's work for an entire price it was held that a modification of the contract by the substitution of tapestry brick for West Barnstable brick in the fireplace was such a radical departure from the original contract as to amount to a revocation of it, and that the plaintiff might recover on a *quantum meruit*. *Sherman* v. *Buffington*, 139.

In a suit in equity to rescind a contract for the exchange of real estate procured by false and fraudulent representations of the defendant as to the boundaries of a farm which he conveyed to the plaintiff in exchange for a conveyance of real estate made to him by the plaintiff, it is not necessary that the plaintiff should have offered to return the farm with its appurtenant personal property to the defendant before filing his bill, if he offers in the bill to do so, and

in his prayer for relief offers to make such restitution as may be ordered by the court. *Lefevre* v. *Chamberlain*, 294.

In the same suit upon findings of a master as to the value of that part of the farm falsely described by the defendant which proved to be outside the actual boundaries, it was said that the measure of damages was brought within the rule that in an action for deceit the damages are measured by the difference between the value actually received and what that value would have been if the representations had been true. *Ibid.*

In a suit in equity to rescind for fraud a contract for the exchange of real estate, it appeared that, after the decree ordering rescission and reconveyances and after the appeal therefrom, the buildings on the land conveyed by the plaintiff to the defendant had been destroyed partially by fire, so that if the defendant should reconvey as ordered by the decree the plaintiff's former estate would not be restored to him, and it was held that under these circumstances the bill would be retained for the assessment of damages. *Ibid.*

In Writing.

If an experienced business man makes an application in writing to a life insurance company for a "thirty year endowment policy" for the benefit of his wife, there is no ambiguity as to the kind of policy applied for. *Hayes* v. *Penn Mutual Life Ins. Co.* 122.

In an action of contract for the price of repairs made upon a motor car of the defendant, purchased by the defendant from the plaintiff under a contract in writing signed by the parties, which appeared on its face to be a complete contract embracing all the particulars necessary to make a perfect agreement, it was held that an oral agreemant made before the contract in writing should have been excluded as evidence and, having been admitted, could not be considered, the rights of the parties being defined by their agreement in writing. *MacAlman* v. *Gleason*, 454.

Where a building contract in writing contains a provision that "If any extra work is required, a price for the same must be agreed upon and approved in writing by the architect before such work is begun," the architect has no authority to waive the condition precedent of his approval in writing or to bind the owner by any oral order, and the contractor cannot recover from the owner for extra work and disbursements merely agreed to and approved by the architect orally. *Burns* v. *Thorndike*, 552.

Implied.

Under the agreement of a corporation conducting a private hospital with a woman patient, who was about to have an operation performed there by her own surgeon after being etherized by her family physician, where, after the operation was performed and while the patient still was unconscious under the influence of ether, one of the two hospital nurses, who were present during the operation and assisted in carrying her to her room, forcibly pulled off a valuable ring from the patient's finger and stole it, it was held that such action was violation by the corporation of its duty to the patient under its contract, for which the patient might hold it liable in an action of tort. *Vannah* v. *Hart Private Hospital*, 132.

Contract (*continued*).

If the plaintiff in the case described above when received into the hospital had been asked to put all her "valuables" into the custody of the hospital and had failed to comply with the request in regard to her rings, this would have been a defence to the action, because then the duty owed by the corporation under its contract would not have extended to the care of the rings on the patient's fingers. *Vannah* v. *Hart Private Hospital*, 132.

If, however, the plaintiff merely was asked to put her money into the custody of the hospital but was not asked to put anything else into its custody, the defence would not be made out. *Ibid.*

In an action by a mason on an account annexed for work and materials furnished for a cottage of the defendant, where there had been a special contract between the parties for doing certain mason's work for an entire price, it was held that a modification of the contract by the substitution of tapestry brick for West Barnstable brick in the fireplace was such a radical departure from the original contract as to amount to a revocation of it, and that the plaintiff might recover on a *quantum meruit*. *Sherman* v. *Buffington*, 139.

In the case above described it appeared that in laying the tapestry brick and building the fireplace the plaintiff followed the personal directions of the defendant and that he used ordinary skill, that the fireplace when finished was not a good fireplace and was not constructed in a "workmanlike manner," but that this was due to the failure of the defendant to furnish the plaintiff with adequate plans and necessary materials, and it was held that the plaintiff might recover the value of his work and materials furnished. *Ibid.*

In an action for money had and received brought by a conservator against a trust company, with which, as alleged, he had deposited the money in his own name as conservator for his ward, it was said that a defence, that the plaintiff was estopped by his conduct in joining with the executor of the ward's will in a certain petition for partial distribution which mentioned the deposit as a part of the estate, could not prevail, because the plaintiff by joining in the former proceedings had not lost his right to claim the deposit if it stood in his own name and the contract of the defendant was made with him and not with his deceased ward. *Day* v. *Old Colony Trust Co.* 225.

It also was held that the defence of such an estoppel, not being set up in the answer, was not open to the defendant. *Ibid.*

Where the declaration in an action of contract contains only a count on an account annexed for work done and materials furnished, the plaintiff cannot recover for a breach of a covenant in a deed without amending his declaration by substituting or adding a count for breach of the covenant. *New York Central & Hudson River Railroad* v. *Clarke*, 274.

On the evidence in an action brought by a physician against the executor of the will of a married woman for his services up to the time of her death, it was held that it could be found that the defendant's testatrix intended the plaintiff to understand that her estate should be bound to pay his charges if they were not paid before her death, and that this would be equivalent to a promise to pay the debt after her death, on which the plaintiff could recover. *Charron* v. *Day*, 305.

Building Contract.

In an action by a mason on an account annexed for work and materials furnished for a cottage of the defendant, where there had been a special contract between the parties for doing certain mason's work for an entire price, it was held that a modification of the contract by the substitution of tapestry brick for West Barnstable brick in the fireplace was such a radical departure from the original contract as to amount to a revocation of it, and that the plaintiff might recover on a *quantum meruit*. *Sherman* v. *Buffington*, 139.

In the case above described it appeared that in laying the tapestry brick and building the fireplace the plaintiff followed the personal directions of the defendant and that he used ordinary skill, that the fireplace when finished was not a good fireplace and was not constructed in a "workmanlike manner," but that this result was due to the failure of the defendant to furnish the plaintiff with adequate plans and necessary materials, and it was held that the plaintiff might recover the value of the work and materials furnished. *Ibid.*

In the same case it appeared that the plaintiff instead of building the basement walls of concrete, as had been required by an unchanged part of the original contract, built these walls of artificial concrete or cement blocks laid in lime mortar, and that in consequence the walls as constructed were not impervious to water, as they should have been, and that it would take $20 to make the walls as good as those called for by the contract, and it was held that the judge rightfully deducted $20 from the total fair value of the work and materials furnished. *Ibid.*

Where a building contract in writing contains a provision that "If any extra work is required, a price for the same must be agreed upon and approved in writing by the architect before such work is begun," the architect has no authority to waive the condition precedent of his approval in writing or to bind the owner by any oral order, and the contractor cannot recover from the owner for extra work and disbursements merely agreed to and approved by the architect orally. *Burns* v. *Thorndike*, 552.

Of Conditional Sale.

See SALE, *Conditional.*

CORPORATION.

Subscription to Shares.

The signing of an agreement in writing to subscribe for the shares of a proposed Massachusetts corporation, which refers to a prospectus, in which is stated certain advice of counsel that a new corporation be formed to take over the property of a certain Virginia corporation, was held not to create a contract of the subscribers with the Virginia corporation or with any of its stockholders. *Jamestown Portland Cement Corp.* v. *Bowles*, 176.

Dissolution.

It was held that a bill in equity brought by a corporation dissolved by St. 1913, c. 277, during the three years following its dissolution, while it was by

St. 1903, c. 437, § 52, "continued as a body corporate . . . for the purpose of prosecuting and defending suits," must be dismissed if it is pending after the three years, because no decree could be entered either for or against the non-existent corporation. *Boston Tow Boat Co.* v. *Medford National Bank*, 484.

In the above suit the plaintiff asked leave to show that the claim sued upon had been assigned by the plaintiff before its dissolution and therefore asked to amend the bill to bring the suit in the name of the assignee under the provision of § 3 of that statute, and it was ordered, that the reservation for this court be discharged, and that, unless further proceedings to amend the bill should be presented before a single justice before a day named, a decree should be entered dismissing the bill, regardless of the merits, because of the non-existence of the plaintiff. *Ibid.*

Taxation.

See TAX, *Corporation.*

Returns to Secretary of the Commonwealth and to Tax Commissioner.

At the trial of a petition under St. 1906, c. 463, Part I, § 37, by a corporation for the assessment of damages to the petitioner's land and factories by changes of grade made in the abolition of the grade crossing of a railroad with a highway, where the president of the petitioner had testified as a witness, it was held to be within the discretion of the trial judge to admit in evidence, as bearing upon the credibility of the witness, the annual reports by the petitioner to the Secretary of the Commonwealth under St. 1903, c. 437, § 45, R. L. c. 110, § 51, and Pub. Sts. c. 106, § 54, a letter to the local assessor, and returns to the Tax Commissioner for certain years made under Pub. Sts. c. 13, § 38, as amended by R. L. c. 14, § 37. *Union Glass Co.* v. *Somerville*, 202.

In the same case it was held that the reports and returns, which were made before August 1, 1903, having been executed by the petitioner's officers, were competent evidence of value in behalf of the respondent. *Ibid.*

In the same case it was held that the admission in evidence of returns, made by the corporation to the Tax Commissioner after August 1, 1903, when St. 1903, c. 437, § 48, took effect, which made such returns confidential and privileged and no longer admissible in evidence as admissions, was a material error seriously prejudicial to the petitioner, and required that the exceptions should be sustained. Following Brackett *v.* Commonwealth, 223 Mass. 119, 126. *Ibid.*

In the same case it was held that, in admitting the returns in evidence, the presiding judge should have instructed the jury to disregard the items stating the market value of the shares of the petitioner, as these statements, required by statute to be made for the information of the Tax Commissioner, did not represent that the market or trading value of its capital stock corresponded with the value of its real estate that had been damaged by the changes of grade. *Ibid.*

In the same case it was said that it was not necessary to decide whether under St. 1913, c. 716, § 1, the error mentioned above would have been sufficient to require a new trial, as a substantial error was committed in admitting other evidence. *Ibid.*

Foreign.

St. 1914, c. 724, relating to an excise tax upon foreign corporations is constitutional and valid. *International Paper Co.* v. *Commonwealth*, 101.

Other rulings as to the imposition of the excise under the above statute. *Ibid.*

Where a foreign corporation actually doing business in this Commonwealth has been brought within the jurisdiction of a court of this Commonwealth by the service under St. 1913, c. 257, of a writ upon its agent, who is a resident of this Commonwealth, voluntarily appointed by it to have charge of its business here, it becomes answerable in this jurisdiction to any transitory cause of action, including an action at law on promissory notes made and negotiated by it in another State. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

Defendant was held not entitled to set up in an action at law which previously had been a suit in equity a plea in abatement that the court had no jurisdiction of the case because of lack of service upon the defendant, a foreign corporation, where it appeared that the question had been decided for the plaintiff while the suit was in equity. *Ibid.*

Paper Mills.

It is matter of common knowledge that there are in this Commonwealth many mills for the manufacture of paper, and, in the absence of evidence to the contrary, it will be assumed that such mills are salable in the market at fair prices. *International Paper Co.* v. *Commonwealth*, 101.

Charitable.

A corporation named the World Peace Foundation, organized under the laws of this Commonwealth which was a beneficiary under the will of Edwin Ginn, who had organized it, was held to be a charitable society or institution within the meaning of St. 1912, c. 678, § 1, and St. 1909, c. 490, Part I, § 5, and accordingly the passing of property to it by will was held not to be subject to a legacy and succession tax. *Parkhurst* v. *Treasurer & Receiver General*, 196.

Whether the passing of a gift by will to a corporation is subject to a legacy and succession tax, or whether it is exempt from such a tax as the passing of a gift to a charitable society or institution, depends on the purposes and work of the corporation at the time of the death of the testator, when his will took effect after it was proved, and subsequent acts of the corporation only can be material so far as they tend to show what the character of the corporation was at that time. *Ibid.*

Fraternal Beneficiary Corporation.

See that title.

Municipal Corporations.

See that title.

Banking Corporations.

See BANK; SAVINGS BANK.

CORRUPT PRACTICES ACT.

See appropriate subtitle under ELECTIONS.

COSTS.

In actions at law, see appropriate subtitle under PRACTICE, CIVIL.
In suits in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.
In probate appeals, see appropriate subtitle under PROBATE COURT.

COVENANT.

A covenant in a deed to a railroad corporation that the grantor will and that his heirs, executors and administrators shall make and maintain at all times thereafter a good and sufficient fence or fences or wall or walls on the boundary lines between the grantor's own land and the granted premises, "which fences or walls shall be forever kept, maintained and made at my expense and the expense of my heirs, executors, administrators and assigns," is a covenant running with the land and binding on the grantor's successors in title. *New York Central & Hudson River Railroad* v. *Clarke*, 274.

As to a certain covenant in a lease of the defendant, in an action for personal injuries suffered in the defendant's building, to the plaintiff's employer it was held that, whatever might be the respective rights of the landlord and the tenant under this covenant, it did not deprive the plaintiff of her remedy against the owner of the building, whose negligence caused her injury. *Maran* v. *Peabody*, 432.

CUSTOM.

The fact that a party to an action did or did not do a certain act cannot be proved by evidence that at other times it had been his custom to do or not to do this act. *Luiz* v. *Falvey*, 253.

At the trial of an action for personal injuries caused by the collision of the plaintiff's bicycle with the defendant's motor truck, a witness for the plaintiff was allowed without objection to testify that he had seen the defendant's truck go up this same road at other times and, on cross-examination, the defendant, subject to the plaintiff's exception, was allowed to ask the witness "What kind of a turn" the defendant's truck "customarily" made in going round the corner in question; and the plaintiff's exception was sustained because the question in regard to the manner of turning the corner was not opened by the plaintiff, so that the rule as to the discretionary power to allow an immaterial issue to be met after being opened did not apply. *Ibid.*

DAMAGES.

For Property taken or damaged under Statutory Authority.

Petition under St. 1906, c. 463, Part I, § 37, for damages resulting from the abolition of a grade crossing of a railroad with a highway. *Union Glass Co.* v. *Somerville*, 202.

St. 1915, c. 112, purporting to confer on the Land Court jurisdiction under

certain circumstances to register the title to a petitioner's land free from equitable restrictions, where the petitioner has paid into court a sum found to be a proper compensation, is unconstitutional and void, because the taking of property for a private purpose without the consent of its owner upon payment of full compensation is a violation of arts. 1, 10 of the Declaration of Rights and cannot be authorized by statute. *Riverbank Improvement Co.* v. *Chadwick*, 242.

For Breach of Contract.

Question whether a certain lessee was entitled to damages in a suit against his lessor for a breach of quiet enjoyment under the lease. *Arafe* v. *Howe*, 46.

In Tort.

In an action by a workman against one who unwarrantedly interfered with his employment, claiming to have an assignment of his wages, it was held that the question, whether the defendant wilfully interfered with the plaintiff's contract of employment, was for the jury and, if they found that he did so wilfully interfere, the plaintiff was entitled to reasonable compensation for his mental distress and anxiety. *Doucette* v. *Sallinger*, 444.

In Suit in Equity.

Retention of a suit, which had been begun for injunctive relief, for the assessment of damages, it appearing that the reason for injunctive relief no longer existed. *Aronson* v. *Orlov*, 1.

In the above suit, interest was allowed, on a sum found by a master, from the date of his report. *Ibid.*

Question whether a certain lessee was entitled to damages in a suit against his lessor for a breach of quiet enjoyment under the lease. *Arafe* v. *Howe*, 46.

In a suit in equity it was found by a master that two streets, the fee to which was in the plaintiff, never had been laid out as public ways and never had become such ways by dedication or prescription and that the use of them by the public was permissive, and it appeared that the town in which they lay, against which the suit was brought, with knowledge of the plaintiff's claim of ownership and against his protest had constructed sewers through these streets without authority to do so, and it was held that the plaintiff was not required to accept indemnity in money damages and was entitled to relief by injunction. *Brown* v. *Peabody*, 52.

In the case above described it was found by a master that the plaintiff was damaged in the sum of $250 by reason of the acts of the defendant, which sum included all past and future damages that might accrue to him, and it was held that the maintenance of the sewers in the plaintiff's land was a substantial continuing trespass, for which an assessment of past and future damages could not be made rightfully without the plaintiff's consent. *Ibid.*

In a suit in equity to rescind for fraud a contract for the exchange of real estate, it appeared that, after the decree ordering rescission and reconveyances and after the appeal therefrom, the buildings on the land conveyed by the plaintiff to the defendant had been destroyed partially by fire, so that if the defendant should reconvey as ordered by the decree the plaintiff's former estate would not be restored to him, and it was held that under

these circumstances the bill would be retained for the assessment of damages. *Lefevre* v. *Chamberlain*, 294.

In the same suit, upon findings of a master as to the value of that part of the farm falsely described by the defendant, which proved to be outside the actual boundaries, it was said that the measure of damages was brought within the rule that in an action for deceit the damages are measured by the difference between the value actually received and what that value would have been if the representations had been true. *Lefevre* v. *Chamberlain*, 294.

Recoupment.

In an action upon an account annexed for work and materials furnished for the defendant's cottage, it appeared that the plaintiff instead of building the basement walls of concrete, as had been required by an unchanged part of the original contract, built these walls of artificial concrete or cement blocks laid in lime mortar, and that in consequence the walls as constructed were not impervious to water, as they should have been, and that it would take $20 to make the walls as good as those called for by the contract, and it was held that the judge rightfully deducted $20 from the total fair value of the work and materials furnished. *Sherman* v. *Buffington*, 139.

In an action on a covenant in a lease to pay rent it was said that, if a certain averment in the answer was to be treated as a pleading in recoupment, the defendant, while denying that the covenant to pay rent was in force against him, could not rely on alleged breaches by his lessor of covenants in the same lease as a ground for damages. *Taylor* v. *Kennedy*, 390.

DEATH.

A contract to pay money after one's own death is valid. *Charron* v. *Day*, 305.

It was held that, at the trial of an action of contract against an executor by the administrator with the will annexed of the alleged widow of the defendant's testator for the amount of certain legacies bequeathed to her as such widow, upon the question, whether the widow survived her husband, they both having been killed in a limousine that was run into by a railroad train, there was evidence for the jury that the plaintiff's testatrix survived her husband and became entitled to the legacies. *Robson* v. *Lyford*, 318.

Declarations of deceased persons as evidence, see appropriate subtitle under EVIDENCE.

Actions for death by wrongful act, see NEGLIGENCE, *Causing Death.*

DEED.

Construction.

In determining in a suit in equity the question of fact, whether the owner of a tract of land, who conveyed it to different persons by a number of deeds made between the years 1825 and 1850 describing the land as abutting on certain private streets, intended to convey to the grantees of the several lots any right in the fee of such private streets, it is proper to consider the state of the law in this Commonwealth at the time the deeds were made. *Brown* v. *Peabody*, 52.

Where a master in a suit in equity, whose findings had been accepted by the

parties, in passing upon the question of fact stated above found "that the original grantor, J P, did not intend to part with the fee in the two streets in question" and further found that "the plaintiff has whatever title J P retained in these streets," it was held that the master was plainly right in finding that the title to the fee in the two streets in question was in the plaintiff. *Brown* v. *Peabody*, 52.

Validity.

A conveyance of real estate can be avoided on the ground that it was made in fraud of creditors only by a creditor or by one who has the rights of a creditor. *Fuller* v. *Fuller*, 441.

One who as a devisee is seised of real estate, of which he is in possession and control, can maintain a suit in equity to remove from his title a cloud created by an invalid tax sale and a deed given thereunder. *Ibid.*

Validity of tax deed, see appropriate subtitle under TAX.

DESCENT AND DISTRIBUTION.

By Pub. Sts. c. 135, § 3, as amended by Sts. 1882, c. 141; 1885, c. 276, under the circumstances it was held that the widow of the second son of a testatrix became entitled to one half of an interest which had vested in her husband under the provisions of his mother's will. *Whitman* v. *Whitney*, 18.

DEVISE AND LEGACY.

Extrinsic Evidence of Intention of Testator.

Where a will purports to dispose of all of the property of the testator, evidence is not admissible, for the purpose of showing that the will did not operate as to an interest of the testator under the will of his mother and that the deceased was intestate as to such interest, which tends to show that the testator was of the opinion and believed that he had no interest under his mother's will and that he was so advised by his attorney. *Whitman* v. *Whitney*, 18.

Time of Vesting.

Under a provision in a will creating a trust, the income of which should be divided between the two daughters of the testatrix, providing "And if both my said daughters shall die leaving no child which shall attain the age of twenty-one years, then the whole of said deceased sisters share I give devise and bequeath to my" two sons, it was held that the two sons took a vested interest in the trust fund, and the share of each was transmissible by will or subject to distribution as property under the laws regulating the descent and distribution of intestate estates. *Whitman* v. *Whitney*, 18.

A testator devised and bequeathed the residue of his estate to his executors as trustees to pay during the life of his wife one half of the net income to his wife and the other half of the net income to his son and, upon the death of his wife, to pay, convey and deliver all the property to his son, "to have and to hold to him and his heirs and assigns forever," and it was held that the son took a vested remainder. *Partridge* v. *Clary*, 290.

Estates given by a will are regarded as vesting immediately unless the testator

by clear words has manifested an intention that the vesting shall be contingent upon a future event. *Welch* v. *Colt*, 511.

It was held that, under the provisions of a trust under a will relating to payment of income to the testator's children and on their death for their children, "and each of my grandchildren, on arriving at the age of twenty-one years is to receive his or her share or proportion of said rest, residue & remainder of my estate," the interest in remainder of a grandchild of the testator who had died before the testator's child, her mother, vested immediately upon the testator's death and was not contingent upon such grandchild surviving her mother, and therefore was disposed of by such grandchild's will. *Ibid.*

A provision in the same will as to a sale of real estate by the trustee only with the consent in writing of a certain one of the daughters of the testator without requiring the consent of such of her children as should have reached the age of twenty-one years was held not to show that the testator did not regard the children of that daughter as having a vested interest in such real estate during the life of their mother. *Ibid.*

Identity of Legatee.

A legacy "toward the building of an Episcopal Church in the Highlands, which shall be an independent church, not a mission church, as I feel that such a church is much to be desired there," was held under the circumstances to have been intended for an incorporated Episcopal church in the district called the Highlands, which had not been completed when it first was erected and still remained unfinished. *Taber* v. *St. Peter's Parish*, 312.

Per Stirpes or Per Capita.

Where a will contained the following residuary clause: "I direct that the remainder of my property if there be any, be divided in equal shares between Willie Wilder, the children of Ella Roper Phillips and the children of the late George S. Roper, share and share alike," and there were six children of Ella Roper Phillips and three children of George S. Roper, upon a contention by Willie Wilder that he was given one third of the residue, it was held, that the property should be divided into ten equal parts of which Willie Wilder should receive one. *Leslie* v. *Wilder*, 343.

Residue Clause.

Construction of a residue clause of a will upon which it was held that the testatrix did not intend to control or direct the disposition of the residue of a trust estate after it had become vested in her sons; and therefore that the property, which under the will had vested in the second son at the death of the testatrix, on his death passed from him by the laws of intestate descent and distribution and not under the will. *Whitman* v. *Whitney*, 18.

Lapsed Legacy.

A life interest created by will for the benefit of the testator's wife was held to have lapsed, where it was agreed for the purposes of the case that the testator

and his wife were killed by an accident "at the same instant of time;" and it also was held that the pecuniary legatees in remainder, all of whom were living at the time of the testator's death, became entitled to their legacies. *Lyford* v. *McFetridge*, 285.

In the same case it was held that, the will having provided that the pecuniary legacies should be paid by a trustee, the direction as to the payment of such legacies was in legal effect the same as if the testator had directed that they should be paid by the executor of his will, and accordingly that the usual rule was applicable, that an executor is not chargeable with interest on pecuniary legacies until the expiration of one year from the death of the testator. *Ibid.*

Trust Provisions.

Construction of testamentary trusts, see appropriate subtitle under TRUST.

Incorporation of Statutory Provisions.

Where the language of the residuary clause in a carefully drawn will incorporates the language of the statute of distributions in force when the will was made, which also was in force at the time of the death of the testator, and where no reason is shown for a different interpretation, the construction of the clause should follow the judicial construction of the statute. *Green* v. *Hussey*, 537.

Application of the foregoing as to a will of a testatrix, who made her will and died when Gen. Sts. c. 91, § 1, cl. 1, was in force, wherein the trustees were ordered to distribute and divide the whole of the residuary estate "to and among all the lineal descendants then living of my grandfather, G H, and if all the lineal descendants aforesaid then living are in the same degree of kindred to the said G H, they shall share the said Estate equally and shall be paid in equal shares; otherwise they shall take according to the right of representation." *Ibid.*

"Right Heirs at Law."

Upon the construction of the residuary clause of a will containing the words, "And upon the decease of either of said sons or daughters leaving no issue then said Trustees shall pay over and convey the whole of the trust share and estate of such deceased son or daughter to my right heirs at law," it was held that the words "my right heirs at law" meant those sons and daughters of the testator and the issue of any deceased child who were living at the time of the testator's death. *State Street Trust Co.* v. *Sampson*, 411.

"Issue."

It was held that, in the expression used in a will, "In the event of the decease of either of my children without leaving lawful issue," the testator used the word "issue" in its ordinary sense of all lineal descendants and not as meaning children. *Welch* v. *Colt*, 511.

The word "issue" in a will is to be construed in its common acceptation to include all lineal descendants unless the circumstances indicate a clear intention of the testator to give the word a meaning other than its common one. *Ibid.*

"Lineal Descendants."

Where the will of a testatrix gave the residue of her property, upon the termination of a life interest, to the "lineal descendants then living" of her grandfather it was held that the "lineal descendants then living" must be those recognized as such by the law of this Commonwealth, that by such law the *status* of the sons of the grandchild as to legitimacy was dependent upon the law of their domicil unless that was contrary to the statute law or the public policy of this Commonwealth, and that the law of their domicil, Indiana, showed that certain sons, born of another grandchild of the grandfather and a woman who in good faith thought she was a wife although she was not, were legitimate, so that they were entitled to share equally with a legitimate child as his lineal descendants. *Green* v. *Kelley*, 602.

Interest on Legacy.

Upon a bill for instructions by the trustees under the will of Edwin Ginn, it was held as to certain legacies which became due only upon the happening of the contingency that principal of the estate had become available for such payment after satisfying all prior legacies, absolute and contingent, that event should be considered to have happened on April 11, 1916, and not before, and that therefore the absolute legacies should bear interest from that date at the rate of four per cent per annum in accordance with St. 1915, c. 151, § 2. *Parkhurst* v. *Ginn*, 159.

DISBARMENT.

See appropriate subtitle under Attorney at Law.

DISTRICT COURT.

See Police, District and Municipal Courts.

DIVORCE.

See Marriage and Divorce.

DYNAMITE.

Action for personal injuries resulting from the explosion of dynamite left unexploded by a previous blast in blasting operations. *Cogliano* v. *Ferguson*, 147.

ELECTIONS.

Official Ballot.

Upon a petition for a writ of mandamus a finding of a single justice, warranted by the evidence presented before him, that the surname of a candidate for Governor always has been spelled "McCall" and never has been spelled "MacCall," that the name of the candidate is "McCall" and not "MacCall"

and that under St. 1913, c. 835, § 259, "the name of Frederick W. Mansfield should precede that of Samuel W. McCall in the arrangement of names in alphabetical order upon the official ballot of candidates for Governor," is a finding of fact which is not open to revision by this court. *Mansfield* v. *Secretary of the Commonwealth*, 262.

Corrupt Practices Act.

Constitutionality.

There is nothing in the corrupt practices act in conflict with any provision of the Constitution of the United States. *Ashley* v. *Three Justices of Superior Court*, 63.

The provisions of the act impose no unconstitutional limitations upon the right to vote or the right to hold office. *Ibid.*

The provision of the act contained in St. 1913, c. 835, § 371, as amended by St. 1914, c. 783, § 11, excepting from its operation the elections of town officers in towns of less than ten thousand inhabitants, does not impair the constitutional validity of the act. *Ibid.*

There is nothing in the act in derogation of the constitutional powers of the Supreme Judicial Court. *Ibid.*

There is nothing in the act that deprives the respondent in an election petition of the equal protection of the laws. *Ibid.*

There is nothing in the act in conflict with the provision of art. 9 of the Declaration of Rights that "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." *Ibid.*

The provisions of the act that election petitions shall be entered in the Superior Court in Suffolk County is within the power of the General Court, and the respondent's right under art. 11 of the Declaration of Rights "to obtain right and justice freely" is not impaired thereby. *Ibid.*

Article 15 of the Declaration of Rights does not apply to an election petition under the statute named above; because the right to hold an office to which one has been elected is not "property" within the meaning of the word as used in the Declaration of Rights and a proceeding upon an election petition is not a "suit between two or more persons" in the sense in which those words there are used. *Ibid.*

By an assignment by the Chief Justice of the Superior Court under authority of St. 1914, c. 783, § 10, (*c*) of three judges of that court to hear election cases during the year no new tribunal is created, and the statute does not violate c. 2, § 1, art. 9 of the Constitution, which provides that "All judicial officers . . . shall be nominated and appointed by the Governor, by and with the advice and consent of the Council." *Ibid.*

For the reason named above it did not become necessary for this court in the present case to consider whether the subject of elections is of a nature so political that the Legislature is unlimited in its power to establish tribunals to deal with questions relating to elections to public office and to define the jurisdiction of such tribunals. *Ibid.*

The portion of the corrupt practices act contained in St. 1914, c. 783, § 10, which in Dinan *v.* Swig, 223 Mass. 516, was held to be unconstitutional and

void as in violation of the provisions of the Constitution, which makes each branch of the General Court the final judge of the returns, elections and qualifications of its own members, is distinct and separate from the rest of the act and does not affect the validity of the other parts. *Ashley* v. *Three Justices of Superior Court*, 63.

Assignment of judges.

Under St. 1914, c. 783, § 10 (*c*), an assignment of three judges who are to hear and determine all matters arising under election petitions during the year, including a petition already filed, made by the Chief Justice nearly three months after the last annual State election on the day following the granting of an order that there was reasonable cause to believe that a corrupt practice had been committed, was held to be a valid assignment. *Ashley* v. *Three Justices of Superior Court*, 63.

By an assignment by the Chief Justice of the Superior Court under authority of the statute named above of three judges of that court to hear election cases during the year no new tribunal is created, and the statute does not violate, c. 2, § 1, art. 9 of the Constitution, which provides that "All judicial officers . . . shall be nominated and appointed by the Governor, by and with the advice and consent of the Council." *Ibid.*

Procedure.

The hearing of an election petition under the corrupt practices act is a civil proceeding in the nature of a quo warranto, and is not a criminal prosecution. *Ashley* v. *Three Justices of Superior Court*, 63.

In an election petition brought under St. 1914, c. 783, § 10, charging a violation of the provisions of the corrupt practices act, a plea in abatement, setting up a defence that the subpoena had been made returnable in fifteen days instead of fourteen days after the filing of the petition, was held to be within the jurisdiction of the Superior Court and not to be open upon a petition for a writ of prohibition, filed a few days after the plea. *Ibid.*

Under St. 1914, c. 783, § 10, an allegation, in a petition charging the respondent with having violated provisions of the corrupt practices act in connection with his election as the mayor of a certain city, that the petitioners are "inhabitants, taxpayers, and qualified voters in the city" in question, is a sufficient averment that the petitioners had a right to vote for mayor at the election in question, which was less than two months before the filing of the petition. *Ibid.*

Moreover, if such allegation were not sufficient, it could be amended, so that the validity of the proceeding would not be impaired. *Ibid.*

The provisions of the corrupt practices act contained in St. 1913, c. 835, § 497, as amended by St. 1914, c. 783, § 12, considered in connection with the Fortieth Amendment to the Constitution, do not give the respondent in an election petition a constitutional right to a trial by jury thereon. *Ibid.*

ELECTRICITY.

Action for personal injuries resulting from a workman of a telephone company coming in contact with electric light wires on a pole of the telephone company. *Whalen* v. *New England Telephone & Telegraph Co.* 361.

EMBLEMENTS.

Growing crops, that were planted by a tenant at will in a part of a garden appurtenant to a tenement then occupied by him, continue to belong to him after his tenancy and occupation have been terminated by his landlord giving a lease in writing to a third person of the building containing his tenement. *Commonwealth* v. *Galatta*, 308.

A lessee under a lease given him to terminate a tenancy at will, who pulls up and throws in a heap growing crops that were planted by the tenant at will, can be found guilty of wantonly destroying the personal property of another upon a complaint under St. 1904, c. 305. *Ibid.*

EMINENT DOMAIN.

St. 1915, c. 112, purporting to confer on the Land Court jurisdiction under certain circumstances to register the title to a petitioner's land free from equitable restrictions, where the petitioner has paid into court a sum found to be a proper compensation, is unconstitutional and void, because the taking of property for a private purpose without the consent of its owner upon payment of full compensation is a violation of arts. 1, 10 of the Declaration of Rights and cannot be authorized by statute. *Riverbank Improvement Co.* v. *Chadwick*, 242.

EMPLOYER'S LIABILITY.

See appropriate subtitle under NEGLIGENCE.

See also WORKMEN'S COMPENSATION ACT.

ENTICEMENT AND SEDUCTION.

As ground for an action by a husband for the alienation of the affections of his wife, see ALIENATION OF AFFECTIONS.

EQUITABLE RESTRICTIONS.

Equitable restrictions are real estate as a part of the land to which they are appurtenant. *Riverbank Improvement Co.* v. *Chadwick*, 242.

St. 1915, c. 112, purporting to confer on the Land Court jurisdiction under certain circumstances to register the title to a petitioner's land free from equitable restrictions, where the petitioner has paid into court a sum found to be a proper compensation, is unconstitutional and void, because the taking of property for a private purpose without the consent of its owner upon payment of full compensation is a violation of arts. 1, 10 of the Declaration of Rights and cannot be authorized by statute. *Ibid.*

EQUITY JURISDICTION.

Supreme Judicial or Superior Court.

The exclusive jurisdiction in equity conferred upon the Supreme Judicial Court by R. L. c. 159, § 2, is confined to matters not within the general

principles of chancery jurisdiction and cognizable under statutes which do not provide expressly that the Superior Court also shall have jurisdiction. *Williams* v. *Nelson*, 191.

Plaintiff must come into Court with Clean Hands.

In a suit in equity to obtain the discharge of a mortgage upon personal property, where it appears that the mortgage was given to secure the mortgagee for his liability as indorser upon certain promissory notes for $1,400 and that these notes have been paid in full, it is no defence that the mortgage was made for an unnecessarily large sum and was given by the plaintiff for the purpose of deceiving and defrauding his creditors, which fraud was participated in by all the parties to the mortgage. *Murphy* v. *Moore*, 565.

Remedy at Law.

By going to trial on the merits in a suit in equity the defendant waives a right to defend on the ground that the plaintiff has a complete remedy at law. *Aronson* v. *Orlov*, 1.

Waiver of Defence of Want of Equity.

By going to trial on the merits in a suit in equity without demurrer the defendant waives a right to set up want of equity in the allegations of the bill. *Ryan* v. *Annelin*, 591.

Bill for Instructions.

In a bill for instructions trustees under a will are not entitled to be instructed as to payments made by the executors of the will for taxes or otherwise and allowed by the Probate Court in the executors' accounts. *Parkhurst* v. *Ginn*, 159.

Bill for instructions by trustees under the will of Edwin Ginn. *Ibid.*

In the same case the court declined to instruct the trustees as to the income which in a contingency might be payable to one or both of the sons of the testator. *Ibid.*

In a suit in equity by the trustees under a will for instructions, where it appears that by the clear terms of the will the proceeds from the sale of a certain house of the testatrix are given to a certain church corporation, a letter written by the testatrix dated nearly eight years after the date of her will and addressed to the executors of her will but not executed as a codicil, declaring her intention to make a change in her will in regard to the disposition of the proceeds from the sale of the house in question, is not admissible in evidence and cannot be considered by the court. *Taber* v. *St. Peter's Parish*, 312.

Specific Performance of Contract.

Negotiations, proposals or schemes, which do not possess the essential elements of a completed contract, cannot be enforced in equity by a bill for

specific performance. Nothing short of a completed contract can be made the foundation of such a bill. *Jamestown Portland Cement Corp.* v. *Bowles*, 176.

Reformation of Instrument in Writing.

In a suit in equity by a lessee to reform a lease to him of the basement of a business building and for an abatement of rent, a finding by the trial judge that "the whole basement under the building leased to the plaintiff includes the space under the sidewalk and outside the vertical plane of the walls of the building," was held under the circumstances to have been warranted. *Arafe* v. *Howe*, 46.

In the same suit the trial judge found that the structure in the basement under the sidewalk was not built by either the plaintiff or the defendant, and it appeared that the structure was used by the city of Boston in connection with its high pressure water system, but the evidence failed to show who placed it there, and it was held that there was no evidence to show a taking by the city by right of eminent domain and consequently that the plaintiff was not entitled to a suspension or abatement of "a just proportion of the rent" under a clause of the lease relating to a taking by right of eminent domain. *Ibid.*

In the same suit, where the trial judge made a finding that the plaintiff because of the presence of the structure was entitled to a reduction of rent and the ground on which the finding was made did not appear in the record, it was held that the defendant would not be liable in damages unless the structure under the sidewalk was erected and maintained upon the leased premises by his authority or consent express or implied. *Ibid.*

It also was held that, in any event, the assessment of damages was erroneous, as the judge had no power to change the contract between the parties, and, if the plaintiff should be entitled to damages, the total amount must be assessed in one sum which the defendants should be ordered to pay to the plaintiff. *Ibid.*

In the suit above described it was ordered that the decree should be reversed and that the case should stand for hearing upon the question, whether the structure in the basement under the sidewalk was placed there and afterwards maintained by license or authority of the defendants, and that, if it should be found that it was, the damages sustained by the plaintiff by reason thereof should be determined. *Ibid.*

Rescission of Contract.

The insured in a policy of endowment insurance after the death of his wife before the expiration of the endowment period cannot maintain a suit in equity to change the binding force of the contract by reason of his own alleged undisclosed mistake in thinking that the policy made the insurance money payable to himself in case he should be living when the thirty year period expired. *Hayes* v. *Penn Mutual Life Ins. Co.* 122.

In such a suit in equity brought by the insured to have the policy cancelled and the amount of the premiums repaid to him, it was held that the plaintiff and his wife, having accepted the policy, could not deprive the insurance company of its rights under it by neglecting to read it, and that it would

be inequitable to compel the insurance company to return the premiums. *Hayes* v. *Penn Mutual Life Ins. Co.* 122.

In the same case the bill sought as alternate relief to have the plaintiff given an equitable lien upon the insurance money to the extent of the premiums paid by him, and it was held, without intimating that such a claim existed, that the insurance company should not be kept in court for the purpose of establishing on this bill a possible claim by the plaintiff against the representative of his deceased wife as the beneficiary of the policy. *Ibid.*

In a suit in equity to rescind a contract for the exchange of real estate procured by false and fraudulent representations of the defendant as to the boundaries of a farm which he conveyed to the plaintiff in exchange for a conveyance of real estate made to him by the plaintiff, it is not necessary that the plaintiff should have offered to return the farm with its appurtenant personal property to the defendant before filing his bill, if he offers in the bill to do so, and in his prayer for relief offers to make such restitution as may be ordered by the court. *Lefevre* v. *Chamberlain*, 294.

In the same suit upon findings of a master as to the value of that part of the farm falsely described by the defendant which proved to be outside the actual boundaries, it was said that the measure of damages was brought within the rule that in an action for deceit the damages are measured by the difference between the value actually received and what that value would have been if the representations had been true. *Ibid.*

In the same suit it appeared that, after the decree ordering rescission and reconveyances and after the appeal therefrom, the buildings on the land conveyed by the plaintiff to the defendant had been destroyed partially by fire, so that if the defendant should reconvey as ordered by the decree the plaintiff's former estate would not be restored to him, and it was held that under these circumstances the bill would be retained for the assessment of damages. *Ibid.*

Conveyance in Fraud of Creditors.

In a suit in equity brought in the name of an administrator for the alleged benefit of the creditors of the plaintiff's intestate to set aside a certain conveyance of real estate as having been made in fraud of creditors, it was held that the trial judge acted properly in confirming a finding by a master that the intestate had no actual intention of defrauding his creditors by the conveyance, and in refusing to confirm a finding of the master that the intestate was insolvent at the time he made the conveyance, because the facts disclosed no fraud in fact or in law. *Pitt* v. *Brouthers*, 298.

A conveyance of real estate can be avoided on the ground that it was made in fraud of creditors only by a creditor or by one who has the rights of a creditor. *Fuller* v. *Fuller*, 441.

Mistake.

The insured in a policy of endowment insurance after the death of his wife before the expiration of the endowment period cannot maintain a suit in equity to change the binding force of the contract by reason of his own alleged undisclosed mistake in thinking that the policy made the insurance money payable to himself in case he should be living when the thirty year period expired. *Hayes* v. *Penn Mutual Life Ins. Co.* 122.

In such a suit in equity brought by the insured to have the policy cancelled and the amount of the premiums repaid to him, it was held that the plaintiff and his wife, having accepted the policy, could not deprive the insurance company of its rights under it by neglecting to read it, and that it would be inequitable to compel the insurance company to return the premiums. *Hayes* v. *Penn Mutual Life Ins. Co.* 122.

Removal of Cloud from Title.

One who as a devisee is seised of real estate, of which he is in possession and control, can maintain a suit in equity to remove from his title a cloud created by an invalid tax sale and a deed given thereunder. *Fuller* v. *Fuller*, 441.

Marshalling of Assets.

In the absence of some special ground for relief a court of equity will not entertain a bill to marshal the assets of an estate between assets within the jurisdiction of the court and assets in a foreign country. *Tod* v. *Mitchell*, 541.

A suit in equity cannot be maintained by a widow to marshal the assets of her husband's estate by ordering the executor of his will to pay the debts and charges of administration out of the proceeds from the sale of real estate owned by him in a foreign country and not out of the assets of his estate in this Commonwealth. *Ibid.*

In a suit in equity to marshal the assets of an estate, a creditor who can hold for the satisfaction of his claim two separate funds belonging to the estate cannot be compelled to address himself first to the one which the plaintiff cannot claim when to do so would result in unreasonable delay and inconvenience or would involve litigation in the collection of his debt. *Ibid.*

An appointment of property made by the donee of a testamentary power to a creditor of such donee for the purpose of discharging the obligation of a guaranty in writing, where the estate of the donee has been represented insolvent and commissioners have been appointed under R. L. c. 142, § 2, gives the appointee no priority over the other creditors of the donee's estate. *Vinton* v. *Pratt*, 468.

To restrain Removal of Personal Property.

Upon subsidiary facts found by a master in a suit in equity involving the validity of contracts of conditional sale for heating apparatus and plumbing materials it was held that a further finding by the master that the heating apparatus and the plumbing materials were personal property was warranted. *Nickels* v. *Scholl*, 205.

Under St. 1912, c. 271, § 1, if an original contract of conditional sale of heating apparatus signed by the purchaser and not by the seller is made within the required time in the clerk's office of the city in which the real estate is situated, this is constructive notice of the contract, and gives the seller as against the mortgagee of the real estate the right to remove such heating apparatus, if unpaid for. *Ibid.*

To reach and apply Liability Insurance in Satisfaction of Judgment for Bodily Injury or Death.

The Superior Court, under its general chancery jurisdiction, has jurisdiction of suits in equity brought under St. 1914, c. 464, by those who have obtained judgments for bodily injury or death by accident against defendants who were insured against such loss or damage when the right of action arose, to reach and apply the insurance money to the satisfaction of such judgments. *Williams* v. *Nelson*, 191.

St. 1914, c. 464, which in substance prohibits the insertion in a contract of casualty insurance made after that statute took effect of a condition that the insured must pay the amount of the loss before liability attaches to the insurer, and which gives to a person injured by fault of the insured in a manner covered by the policy a beneficial interest in the proceeds of the policy and permits him, after he has obtained a judgment against the insured, to maintain a suit in equity in his own name to procure the application of the insurance money to the satisfaction of his judgment, is constitutional. *Lorando* v. *Gethro*, 181; *Williams* v. *Nelson*, 191.

A suit was held to be one within St. 1914, c. 464, the words "loss or damage" including a case where the insured has been held responsible to the extent of the rendition of a judgment against him, although no payment had been made on the judgment. *Williams* v. *Nelson*, 191.

The words of St. 1914, c. 464, quoted above do not include "loss or damage" suffered by a husband by reason of the physical injury of his wife, such consequential financial loss not being a "bodily injury" within the meaning of the statute. *Ibid.*

To restrain Enforcement of Bond to dissolve Attachment.

In a suit in equity to enjoin the defendants from enforcing a bond, given to dissolve an injunction in another suit and signed by the plaintiff as principal and by a corporation as surety, it does not help the plaintiff to show that the bill in equity on which the injunction was granted was amended without notice to the surety, if the amendment was immaterial because the injunction was granted on the allegations of the original bill as it stood before the amendment. *Kirby* v. *Donovan*, 86.

In a suit in equity to enjoin the defendants from enforcing a certain bond given to dissolve a temporary injunction in another suit and signed by the plaintiff as principal, on the ground that the interlocutory decree granting the temporary injunction was void because procured by collusion, it was held that the bill properly was dismissed, where the single justice found that the defendant in the other suit had determined in some way to injure the plaintiff in the present suit financially, but did not find that the plaintiff in the other suit had conspired with the defendant in the other suit to carry that determination into effect. *Ibid.*

To restrain Enforcement or compel Discharge of Lien securing Satisfied Debt.

In a suit in equity to obtain the discharge of a mortgage upon personal property, where it appears that the mortgage was given to secure the mortgagee

for his liability as indorser upon certain promissory notes for $1,400 and that these notes have been paid in full, it is no defence that the mortgage was made for an unnecessarily large sum and was given by the plaintiff for the purpose of deceiving and defrauding his creditors, which fraud was participated in by all the parties to the mortgage. *Murphy* v. *Moore*, 565.

It was said that, if the obligee of a common law bond which was given in an attempt to dissolve a mechanic's lien should attempt to enforce his lien after satisfaction of his bond, he might be enjoined in a suit in equity. *Chertok* v. *Morang*, 598.

To enjoin Lessor from Interfering with Quiet Enjoyment by Lessee.

Where the lessor of a basement in a business building, finding it necessary, in order to make alterations in a store above, to erect certain posts and stringers in the basement, made an agreement in writing with the lessee of the basement that the lessor should be permitted to erect the posts and stringers as shown on a certain plan attached to the agreement and that the lessee should have a yearly reduction of rent, it was held, that the closing up of a window in a toilet room, made necessary by the changes, gave the lessee no right to relief in equity by damages or otherwise. *Arafe* v. *Howe*, 46.

In the same suit in equity brought by the lessee against his lessor it was held that the plaintiff was entitled to no relief or damages for any interference with or impairment of the ventilation of the toilet room caused by the closing up of the window. *Ibid.*

In the same suit it was held that the plaintiff was entitled to no damages by reason of the impairment of the ventilation and light of the basement caused by the lessor placing in the basement pipes which he had a right to place there under the terms of the lease, there being no evidence to show that the lessor in exercising his right to place the pipes there did not act reasonably and in good faith. *Ibid.*

To compel Removal of Permanent Structure built by one Tenant upon Land owned in Common.

Upon findings of a master, in a suit in equity to compel a defendant to remove an alleged permanent structure built by him on a part of a small island owned in common by a number of persons, including the plaintiff and that defendant, as to the character of the island and of the structure, it was held that it must be taken that the building erected by the defendant was a permanent structure and that accordingly an injunction for its removal must be granted. *Muskeget Island Club* v. *Prior*, 95.

To enjoin Trespass by Municipality.

In a suit in equity it was found by a master that two streets, the fee to which was in the plaintiff, never had been laid out as public ways and never had become such ways by dedication or prescription and that the use of them by the public was permissive, and it appeared that the town in which they lay, against which the suit was brought, with knowledge of the plaintiff's claim of ownership and against his protest had constructed sewers through

these streets without authority to do so, and it was held that the plaintiff was not required to accept indemnity in money damages and was entitled to relief by injunction. *Brown* v. *Peabody*, 52.

In the case above described it was found by the master that the plaintiff was damaged in the sum of $250 by reason of the acts of the defendant, which sum included all past and future damages that might accrue to him, and it was held that the maintenance of the sewers in the plaintiff's land was a substantial continuing trespass, for which an assessment of past and future damages could not be made rightfully without the plaintiff's consent. *Ibid.*

In the same suit it appeared that the abuttors on the two streets generally had made connections with the sewers constructed by the defendant and that sewer assessments had been laid by the defendant and had been paid by the abuttors, and it was held that, in view of these facts, the defendant should be allowed a reasonable time within which it might acquire by proper legal proceedings the right to lay and maintain its sewers in the two private streets, if it should choose to do so. *Ibid.*

Accordingly a decree was entered awarding an injunction and commanding the defendant to remove the sewers within five months unless previously the defendant should have acquired the legal right to their maintenance, the court in the meantime retaining the bill for the assessment of damages already suffered. *Ibid.*

To avoid Collusive Decree.

In a suit in equity to enjoin the defendants from enforcing a certain bond given to dissolve a temporary injunction in another suit and signed by the plaintiff as principal, on the ground that the interlocutory decree granting the temporary injunction was void because procured by collusion, it was held that the bill properly was dismissed, where the single justice found that the defendant in the other suit had determined in some way to injure the plaintiff in the present suit financially, but did not find that the plaintiff in the other suit had conspired with the defendant in the other suit to carry that determination into effect. *Kirby* v. *Donovan*, 86.

Retaining Bill.

Retention of a suit, which had been begun for injunctive relief, for the assessment of damages, it appearing that the reason for injunctive relief no longer existed. *Aronson* v. *Orlov*, 1.

In a suit in equity for the rescission of a policy of endowment insurance, where it was held that there was no ground for rescission, the bill sought as alternative relief to have the plaintiff given an equitable lien upon the insurance money to the extent of the premiums paid by him, and it was held, without intimating that such a claim existed, that the insurance company should not be kept in court for the purpose of establishing on this bill a possible claim by the plaintiff against the representative of his deceased wife as the beneficiary of the policy. *Hayes* v. *Penn Mutual Life Ins. Co.* 122.

In a suit in equity to rescind for fraud a contract for the exchange of real estate, it appeared that, after the decree ordering rescission and reconveyances and after the appeal therefrom, the buildings on the land conveyed by

the plaintiff to the defendant had been destroyed partially by fire, so that if the defendant should reconvey as ordered by the decree the plaintiff's former estate would not be restored to him, and it was held that under these circumstances the bill would be retained for the assessment of damages. *Lefevre* v. *Chamberlain*, 294.

In the same suit this court under St. 1913, c. 716, § 2, having before them "all the facts necessary for determining the question in dispute," ordered an amendment of the decree by striking out the order for a rescission and reconveyances and inserting in its place an order for the payment of damages in the sum agreed. *Ibid.*

Disbarment of Attorney at Law.

A suit in equity, begun by a common law writ, cannot be maintained for the disbarment of an attorney at law. *Philbrick* v. *Creed*, 382.

Trusts.

See TRUST.

To enjoin Unlawful Interference.

See UNLAWFUL INTERFERENCE.

EQUITY PLEADING AND PRACTICE.

Amendment.

Proper discretionary action of a judge, in a suit involving the right of former employees to interfere with the plaintiffs' exclusive use of an invention not patented, in refusing to permit the defendants to amend their answers by alleging that their application for a patent was pending until three months after the bill in equity was filed, when it was divided and a patent was granted on the amended application. *Aronson* v. *Orlov*, 1.

In a suit in equity to enjoin the defendants from enforcing a bond, given to dissolve an injunction in another suit and signed by the plaintiff as principal and by a corporation as surety, it does not help the plaintiff to show that the bill in equity on which the injunction was granted was amended without notice to the surety, if the amendment was immaterial because the injunction was granted on the allegations of the original bill as it stood before the amendment. *Kirby* v. *Donovan*, 86.

In a suit in equity by a corporation which, unless amended, must be dismissed because it was pending after the close of three years after the corporation had been dissolved by St. 1913, c. 277, the plaintiff asked leave to show that the claim sued upon had been assigned by the plaintiff before its dissolution and therefore asked to amend the bill to bring the suit in the name of the assignee under the provision of § 3 of that statute, and it was ordered, that the reservation for this court be discharged, and that, unless further proceedings to amend the bill should be presented before a single justice before a day named, a decree should be entered dismissing the bill, regard-

less of the merits, because of the non-existence of the plaintiff. *Boston Tow Boat Co.* v. *Medford National Bank*, 484.

Where a suit in equity against a foreign corporation, which was begun by the insertion of the bill in a common law writ, is amended into an action at law, it remains the same proceeding, and a decision of this court, made in the suit in equity before the amendment, is the law of the case. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

In the same case it was said that the plaintiff, by filing a replication to the plea to the jurisdiction of the court in the suit in equity before the amendment into an action at law, did not waive his right to object to the reopening in the action at law of the issues disposed of in the suit in equity before the amendment. *Ibid.*

Answer.

Where in a suit in equity the defendant answers to the bill without demurrer and goes to trial on the merits he has waived any right to set up want of equity in the allegations of the bill. *Ryan* v. *Annelin*, 591.

Replication.

Filing of a replication to a plea to the jurisdiction did not prevent the plaintiff, after the suit had been amended into an action at law, from objecting to the defendants then again raising the question after it had been decided adversely to him. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

Rules of Court.

Equity Rule 31. See *Murphy* v. *Moore*, 565.

Master.

Findings of fact.

Where a suit in equity is reserved and reported by the trial judge for determination by this court upon a master's report, to which no exceptions were taken, the parties are deemed to have accepted the master's report and are concluded by his findings of fact, and the only question to determine is what decree is to be entered upon the pleadings and the facts as found by the master. *Brown* v. *Peabody*, 52.

Report of evidence.

Where a master is not required, under the rule committing a suit to him, to report the evidence, it would be improper for him to do so without an order of the court. *Aronson* v. *Orlov*, 1.

Recommittal.

Recommittal of a case to a master by the Superior Court for the determination of certain material facts in regard to the plaintiff's title to a certain importation of hides, after a rescript of this court, issued in accordance with the decision at an earlier stage of the suit, was held to be proper. *Peoples National Bank* v. *Mulholland*, 152.

In a suit in equity, before the making of an interlocutory decree confirming a master's report, the defendant had filed a motion to recommit the report to the master for amendment and no formal order was made upon the motion to recommit, and it was held that no such order was required, as the motion to recommit necessarily was denied by the interlocutory decree confirming the master's report. *Fuller* v. *Fuller*, 441.

Objections and exceptions to report.

It is proper to overrule exceptions to a master's report which relate only to findings of fact and refusals to find facts, where the evidence before the master is not reported. *Aronson* v. *Orlov*, 1.

Exceptions to master's report upon an account of a conservator which were overruled because the findings were not shown to have been clearly wrong. *Day* v. *Nichols*, 236.

In a suit in equity in which a master made a report in favor of the plaintiff, to which the defendant filed exceptions based on the refusal of the master to make certain findings of fact requested by him, and an interlocutory decree, without referring to the exceptions, ordered that the report of the master be confirmed, it was held that, although the decree should have stated that the defendant's exceptions were overruled, this informality was not material because no exceptions to a master's refusal to make the findings of fact could be sustained. *Fuller* v. *Fuller*, 441.

Failure to comply with Equity Rule 31 as to the filing of objections to a master's report within five days after notice from the master forecloses a party's right to file exceptions even if later the court extends the time for filing the master's report and under the rule exceptions need not be filed until fifteen days after the report is filed. *Murphy* v. *Moore*, 565.

Findings of Judge.

In a suit in equity by a trustee in bankruptcy of a business corporation against a trust company to set aside as an unlawful preference an assignment by the bankrupt, one month before it was adjudged a bankrupt, of certain accounts to the defendant as additional security for the payment of a demand promissory note of the bankrupt payable to the defendant, findings by the trial judge, it was held, could not be reviewed on an appeal from a final decree for the plaintiff, in the absence of a report of the evidence on which the findings were based. *Abele* v. *Beacon Trust Co.* 438.

In the same case it also was held that an inference of the judge, that "the trust company had reasonable cause to believe that a preference was being effected," was warranted by other facts found by him. *Ibid.*

Memorandum.

Where in a suit in equity the trial judge before making a decree dismissing the bill filed a memorandum of decision, in which he ordered that costs should be awarded to the defendants, and, after a subsequent hearing, revoked this order for costs and ordered the entry of a decree dismissing the bill without costs, it was held that there was nothing in the action of the judge to indicate an abuse of discretion. *Cohen* v. *Levy*, 383.

Decree.

In a suit in equity to enjoin the defendants from enforcing a certain bond given to dissolve a temporary injunction in another suit and signed by the plaintiff as principal, on the ground that the interlocutory decree granting the temporary injunction was void because procured by collusion, it was held that the bill properly was dismissed, where the single justice found that the defendant in the other suit had determined in some way to injure the plaintiff in the present suit financially, but did not find that the plaintiff in the other suit had conspired with the defendant in the other suit to carry that determination into effect. *Kirby* v. *Donovan*, 86.

Decree ordered under St. 1913, c. 716, § 2, in a suit in equity to rescind a contract for fraud, where the suit was retained for assessment of damages. *Lefevre* v. *Chamberlain*, 294.

In a suit in equity in which a master made a report in favor of the plaintiff, to which the defendant filed exceptions based on the refusal of the master to make certain findings of fact requested by him, and an interlocutory decree, without referring to the exceptions, ordered that the report of the master be confirmed, it was held that, although the decree should have stated that the defendant's exceptions were overruled, this informality was not material because no exceptions to a master's refusal to make findings of fact could be sustained. *Fuller* v. *Fuller*, 441.

In the same case the defendant before the making of the interlocutory decree had filed a motion to recommit the report to the master for amendment and no formal order was made upon the motion to recommit, and it was held that no such order was required, as the motion to recommit necessarily was denied by the interlocutory decree confirming the master's report. *Ibid.*

It was held that a bill in equity brought by a corporation dissolved by St. 1913, c. 277, during the third year following its dissolution while it was by St. 1903, c. 437, § 52, "continued as a body corporate . . . for the purpose of prosecuting and defending suits," must be dismissed if it is pending after the three years, because no decree could be entered either for or against the non-existent corporation. *Boston Tow Boat Co.* v. *Medford National Bank*, 484.

Although in a suit in equity, which was reported by the trial judge for determination by this court, it was stated in the record that a "final decree" had been entered, the record was treated as presenting an order for a decree, because after the final decree the only report that the trial judge could make would be of the material facts in case of an appeal. *Ryan* v. *Annelin*, 591.

In the same case it was said that, where on an appeal from a final decree in equity no error appears, the correct disposition of the case is by an order affirming the decree and not by an order dismissing the appeal as was provided by the form of the report in the present case. *Ibid.*

Waiver of Defence.

By going to trial on the merits in a suit in equity the defendant waives a right to defend on the ground that the plaintiff has a complete remedy at law. *Aronson* v. *Orlov*, 1.

Where in a suit in equity the defendant answers to the bill without demurrer and goes to trial on the merits he has waived any right to set up want of equity in the allegations of the bill. *Ryan* v. *Annelin*, 591.

Report.

Where a suit in equity is reserved and reported by the trial judge for determination by this court upon a master's report, to which no exceptions were taken, the parties are deemed to have accepted the master's report and are concluded by his findings of fact, and the only question to determine is what decree is to be entered upon the pleadings and the facts as found by the master. *Brown* v. *Peabody*, 52.

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In the same case it was said that, where on an appeal from a final decree in equity no error appears, the correct disposition of the case is by an order affirming the decree and not by an order dismissing the appeal as was provided by the form of the report in the present case. *Ibid.*

Appeal.

In a suit in equity where a master has made a report in favor of the plaintiff, to which the defendant has filed exceptions, and, upon a hearing on the exceptions and on a motion to confirm the report, the trial judge makes an interlocutory decree overruling the exceptions, confirming the report and adopting the findings therein, from which the defendant takes no appeal, and later by order of the same judge a final decree is entered in favor of the plaintiff, from which the defendant appeals, the only question open on the appeal is whether on the record the bill can be maintained. *Lefevre* v. *Chamberlain*, 294.

Where in a suit in equity the trial judge before making a decree dismissing the bill filed a memorandum of decision, in which he ordered that costs should be awarded to the defendants, and, after a subsequent hearing, revoked this order for costs and ordered the entry of a decree dismissing the bill without costs, it was held that there was nothing in the action of the judge to indicate an abuse of discretion. *Cohen* v. *Levy*, 383.

In a suit in equity by a trustee in bankruptcy of a business corporation against a trust company to set aside as an unlawful preference an assignment by the bankrupt one month before it was adjudged a bankrupt of certain accounts to the defendant as additional security for the payment of a demand promissory note of the bankrupt payable to the defendant, findings by the trial judge, it was held, could not be reviewed on an appeal from a final decree for the plaintiff, in the absence of a report of the evidence on which the findings were based. *Abele* v. *Beacon Trust Co.* 438.

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cree and not by an order dismissing the appeal as was provided by the form of the report in the present case. *Ryan* v. *Annelin*, 591.

Costs.

Upon a bill for instructions, in answer to a question, it was held that the expenses incidental to the prosecution of an action on a probate bond against a defaulting trustee and his surety could not be charged to income, because of the theory of the law that the taxable costs prescribed by the Legislature and recoverable in such an action on the bond were a full indemnity for these expenses. *Cogswell* v. *Weston*, 219.

Nothing is better settled than the rule that in a suit in equity the awarding of costs rests in the sound discretion of the trial judge. *Cohen* v. *Levy*, 383.

Where in a suit in equity the trial judge before making a decree dismissing the bill filed a memorandum of decision, in which he ordered that costs should be awarded to the defendants, and, after a subsequent hearing, revoked this order for costs and ordered the entry of a decree dismissing the bill without costs, it was held that there was nothing in the action of the judge to indicate an abuse of discretion. *Ibid.*

ESTOPPEL.

In an action upon a promissory note where the genuineness of an indorsement is in issue and where the defendant read to the jury the plaintiff's answers to interrogatories propounded to him by the defendant, in which the plaintiff answered, "There is no indorsement by [the payee] to me. The note in question was indorsed [by the payee] in blank before maturity and for value paid [by a certain firm who] assigned the same to me," it was held that a verdict should not have been ordered for the plaintiff because the defendant had not precluded himself from arguing to the jury that the answer was not true. *Whitman* v. *Fournier*, 93.

In an action for money had and received brought by a conservator against a trust company, with which, as alleged, he had deposited the money in his own name as conservator for his ward, it was said that a defence, that the plaintiff was estopped by his conduct in joining with the executor of the ward's will in a certain petition for partial distribution which mentioned the deposit as a part of the estate, could not prevail, because the plaintiff by joining in the former proceeding had not lost his right to claim the deposit if it stood in his own name and the contract of the defendant was made with him and not with his deceased ward. *Day* v. *Old Colony Trust Co.* 225.

It also was held that the defence of such an estoppel, not being set up in the answer, was not open to the defendant. *Ibid.*

Where trustees terminated a trust by payments of the fund to a life beneficiary and to a son who had a vested interest in remainder, taking releases from them, that from the son being of all claims or demands to be made by him or his heirs or legal representatives, and the son died nineteen years after this transaction and the life beneficiary four years later, it was held that, if the executors as trustees had no right to end the trust and distribute the fund when they did so, the children of the son had no standing

in court to complain of it, being bound by their father's release under seal. *Partridge* v. *Clary*, 290.

EVIDENCE.

Matters of Common Knowledge.

It is matter of common knowledge that there are in this Commonwealth many mills for the manufacture of paper, and, in the absence of evidence to the contrary, it will be assumed that such mills are salable in the market at fair market prices. *International Paper Co.* v. *Commonwealth*, 101.

It was said that the jury could find as a matter of common knowledge and experience that a child born on a certain day was begotten approximately nine months before. *Negus* v. *Foote*, 375.

Admissions.

In an action upon a promissory note where the genuineness of an indorsement is in issue and where the defendant read to the jury the plaintiff's answers to interrogatories propounded to him by the defendant, in which the plaintiff answered, "There is no indorsement by [the payee] to me. The note in question was indorsed [by the payee] in blank before maturity and for value paid [by a certain firm who] assigned the same to me," it was held that a verdict should not have been ordered for the plaintiff because the defendant had not precluded himself from arguing to the jury that the answer was not true. *Whitman* v. *Fournier*, 93.

In the same case it was stated in the bill of exceptions that the note produced "was printed upon yellow paper," whereas in answer to an interrogatory the plaintiff had stated that the note was not printed on yellow paper, and the defendant contended that he was entitled to go to the jury on the question of the identity of the note, but it was held that no question of identity was open to the defendant, as he had admitted on the witness stand that the note produced was signed by him and that it was the note described in the declaration. *Ibid.*

Returns of a corporation to the Secretary of the Commonwealth and to the Tax Commissioner before August 1, 1903, were held to be competent evidence of value in behalf of the respondent at the trial of a petition by a corporation for the assessment of damages alleged to have been caused by the abolition of a grade crossing of a railroad with a highway. *Union Glass Co.* v. *Somerville*, 202.

In the same case it was held that the admission in evidence of returns, made by the corporation to the Tax Commissioner after August 1, 1903, when St. 1903, c. 437, § 48, took effect, which made such returns confidential and privileged and no longer admissible in evidence as admissions, was a material error seriously prejudicial to the petitioner, and required that the exception should be sustained. Following Brackett *v.* Commonwealth, 223 Mass. 119, 126. *Ibid.*

In an action where the identity of the writer of certain letters of an incriminating nature was in issue, and the letters had been held to be admissible to impeach by contradiction a witness who had testified that she did not write them, it was held that under the circumstances the contents of the

letters were not admissible to show any tacit admission on the part of the defendant of the truth of the statement contained in them. *Leavitt* v. *Maynes*, 350.

Presumptions and Burden of Proof.

It is a reasonable inference from the fact that a testator voluntarily signed a will that he knew its contents. *Holbrook* v. *Seagrave*, 26.

In an action on a promissory note against the maker, where the defendant had admitted that he signed the note, but there was no evidence in regard to the indorsement of the note by the third person to whom it was made payable, and the note was introduced in evidence with a signature upon its back purporting to be that of the payee, it was said that if nothing more had appeared the presiding judge should have ordered a verdict for the defendant, as an indorsement does not prove itself. *Whitman* v. *Fournier*, 93.

In the case stated above where the defendant read to the jury the plaintiff's answers to interrogatories propounded to him by the defendant, in which the plaintiff answered, "There is no indorsement by [the payee] to me. The note in question was indorsed [by the payee] in blank before maturity and for value paid [by a certain firm who] assigned the same to me," it was held that a verdict should not have been ordered for the plaintiff because the defendant had not precluded himself from arguing to the jury that the answer was not true. *Ibid.*

It is matter of common knowledge that there are in this Commonwealth many mills for the manufacture of paper, and, in the absence of evidence to the contrary, it will be assumed that such mills are salable in the market at fair market prices. *International Paper Co.* v. *Commonwealth*, 101.

In an action by an employee against his employer for personal injuries resulting from the explosion of dynamite left unexploded by a previous blast, it was said that, if an employer conducting work in which blasting is necessary chooses to put the blasting in charge of one man and to make another man the boss of every part of the work except the blasting, there is no necessary presumption as matter of law that the general boss knows the peculiar and concealed dangers incident to blasting. *Cogliano* v. *Ferguson*, 147.

One, who without justification and in breach of fiduciary obligation has commingled his own property with that of another with which he has been entrusted, must at his peril return to the owner that which thus has been appropriated by him wrongfully and must prove what belongs to him or lose it. *Peoples National Bank* v. *Mulholland*, 152.

Want of knowledge of the law requiring the filing by an executor of the list required by St. 1909, c. 490, Part I, §§ 41–43, is no excuse for delay in the filing. *Parsons* v. *Lenox*, 231.

In an action on a covenant in a lease to pay rent the burden is on the defendant to establish an alleged surrender of the lease. *Taylor* v. *Kennedy*, 390.

In an action on a covenant in a lease to pay rent, where the defence relied upon is an alleged eviction, the plaintiff properly may be allowed to introduce evidence to explain his receipt of rent from a third person in order to show that it raised no presumption of an intention to evict the defendant who never had been ousted. *Ibid.*

In the same case it was held that certain dealings with the key of the demised premises, while clearly admissible as evidence to show the conduct of the parties, were not conclusive proof of an eviction of the defendant which absolved him from the obligation to pay rent. *Parsons* v. *Lenox*, 231.

A finding by a judge of the Municipal Court of the City of Boston, reported to the Appellate Division, that there was a default in the payment of the principal and interest of a certain mortgage, cannot be said as matter of law to have been unwarranted, where all the evidence is not reported. *Brown* v. *Learmouth*, 417.

Conflicting evidence upon an issue in regard to the cause of the decay of the timbers and planking of a chartered tugboat was held properly to have been left to the jury with careful instructions. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

Where, at the trial of an action on a policy of life insurance, the defence relied upon was that the insured, among other false representations in his application for the policy, falsely represented that he never had had cancer or tumor and was then in good health, and the judge ordered a verdict for the defendant, it was held that, the burden being on the defendant to show that the misstatements of the insured were made in bad faith or that their falsity increased the risk, the question of fact should have been submitted to the jury. *McDonough* v. *Metropolitan Life Ins. Co.* 450.

Evidence at the trial of an issue relating to the soundness of mind of a testatrix, which was held to justify a refusal to rule that there was no evidence that would justify a finding that the alleged testatrix was of unsound mind because the burden was on the proponent of the will to show that the alleged testatrix was of sound mind, and that with the evidence appearing on the record the general presumption of sanity did not as matter of law require a finding of testamentary capacity. *Panell* v. *Rosa*, 594.

Inferences.

It is a reasonable inference from the fact that a testator voluntarily signed a will that he knew its contents. *Holbrook* v. *Seagrave*, 26.

Inference by the judge who heard a suit in equity by a trustee in bankruptcy to set aside an alleged unlawful preference was held to have been warranted by other facts found by the judge. *Abele* v. *Beacon Trust Co.* 438.

See also subtitle, *Circumstantial, post*, page 664.

Competency.

At the trial of a petition under St. 1906, c. 463, Part I, § 37, by a corporation for the assessment of damages to the petitioner's land and factories by changes of grade made in the abolition of the grade crossing of a railroad with a highway, where the president of the petitioner had testified as a witness, it was held to be within the discretion of the trial judge to admit in evidence, as bearing upon the credibility of the witness, the annual reports by the petitioner to the Secretary of the Commonwealth under St. 1903, c. 437, § 45, R. L. c. 110, § 51, and Pub. Sts. c. 106, § 54, a letter to the local assessor, and returns to the Tax Commissioner for certain years made under Pub. Sts. c. 13, § 38, as amended by R. L. c. 14, § 37. *Union Glass Co.* v. *Somerville*, 202.

In the same case it was held that the reports and returns, which were made before August 1, 1903, having been executed by the petitioner's officers, were competent evidence of value in behalf of the respondent. *Union Glass Co.* v. *Somerville*, 202.

In the same case it was held that, in admitting the returns in evidence, the presiding judge should have instructed the jury to disregard the items stating the market value of the shares of the petitioner, as these statements, required by statute to be made for the information of the Tax Commissioner, did not represent that the market or trading value of its capital stock corresponded with the value of its real estate that had been damaged by the changes of grade. *Ibid.*

In the same case it was said that it was not necessary to decide whether under St. 1913, c. 716, § 1, the error mentioned above would have been sufficient to require a new trial, as a substantial error was committed in admitting other evidence. *Ibid.*

In the same case it was held that the admission in evidence of returns, made by the corporation to the Tax Commissioner after August 1, 1903, when St. 1903, c. 437, § 48, took effect, which made such returns confidential and privileged and no longer admissible in evidence as admissions, was a material error seriously predjudicial to the petitioner, and required that the exceptions should be sustained. Following Brackett *v.* Commonwealth, 223 Mass. 119, 126. *Ibid.*

The fact that a party to an action did or did not do a certain act cannot be proved by evidence that at other times it had been his custom to do or not to do this act. *Luiz* v. *Falvey*, 253.

At the trial of an action for personal injuries caused by the collision of the plaintiff's bicycle with the defendant's motor truck a witness for the plaintiff was allowed without objection to testify that he had seen the defendant's truck go up this same road at other times and, on cross-examination, the defendant, subject to the plaintiff's exception, was allowed to ask the witness "What kind of a turn" the defendant's truck "customarily" made in going round the corner in question. The plaintiff's exception was sustained because the question in regard to the manner of turning the corner was not opened by the plaintiff, so that the rule as to the discretionary power to allow an immaterial issue to be met after being opened did not apply. *Ibid.*

Exception by the defendant to the admission of testimony of the plaintiff at the trial of an action for personal injuries, received at a place of amusement maintained by the defendant when the plaintiff slipped upon a sheet of metal on the floor, explanatory of why she did not have a firm hold of a rail, was overruled because the evidence was competent as bearing upon the plaintiff's due care, and its admission could not have harmed the defendant, as it did not appear that the plaintiff's injury resulted in any degree from the nature of her grasp upon the support. *Ferry* v. *Eastern Consolidated Amusement Co.* 259.

It was held to have been proper for the judge presiding at the trial of two defendants upon a joint indictment for breaking and entering a dwelling house in the night time with the intent to commit larceny therein and for the larceny therein of divers articles of jewelry and precious stones to admit, under certain instructions limiting its use, evidence to show that neither of the defendants had worked for a year before their arrest and that

neither of them had any visible means of support, and that, when arrested about two months after the burglary, they had in their possession money and jewelry, although none of the articles so found were identified as the property stolen or were shown to have come from the house that the defendants were charged with breaking and entering. *Commonwealth* v. *Coyne*, 269.

In an action wherein an issue was, whether a wife, who with her husband was killed in a limousine which was run into by a railroad train, survived him, it was held proper, under the circumstances, to permit a physician to testify that immediately before the day of the accident the wife was in better condition of health than her husband, the evidence being competent upon the issue of survival. *Robson* v. *Lyford*, 318.

It also was held that, in the light of the other evidence on the question of survival, the defendant was not harmed by such evidence within the meaning of St. 1913, c. 716, § 1. *Ibid.*

Relevancy and Materiality.

In an action on a covenant in a lease to pay rent, where the defence relied upon is an alleged eviction, the plaintiff properly may be allowed to introduce evidence to explain his receipt of rent from a third person in order to show that it raised no presumption of an intention to evict the defendant who never had been ousted. *Taylor* v. *Kennedy*, 390.

In an action on a covenant in a lease to pay rent, in which the defence relied upon is an alleged surrender of the lease, where the defendant has introduced evidence of an agreement made in behalf of a proposed corporation to take a lease of the premises for a term of years, the plaintiff properly may be allowed to show that the proposed lease was not to be executed unless the corporation was formed, which never was done, and that the agreement was subject to the existing lease. *Ibid.*

In the same case it was held that certain dealings with the key of the demised premises, while clearly admissible as evidence to show the conduct of the parties, were not conclusive proof of an eviction of the defendant which absolved him from the obligation to pay rent. *Ibid.*

Best and Secondary.

In a proceeding to enforce a mechanic's lien the final judgment is the decree of sale and this, like other judgments, can be proved only by the record or a certified copy of it. *Massasoit-Pocasset National Bank* v. *Borden*, 581.

A warrant of sale following such a decree corresponds to an execution in an action at law and such a warrant, or a certified copy of it, is not competent evidence to prove the decree of sale. *Ibid.*

Remoteness.

The fact that a party to an action did or did not do a certain act cannot be proved by evidence that at other times it had been his custom to do or not to do this act. *Luiz* v. *Falvey*, 253.

In an action in which a material question was, whether a woman survived her husband, they both having been killed when in a limousine which was run

into by a railroad train, testimony of the chauffeur who was operating the car at the time of the accident as to the relative position of the husband and of the wife at a certain point on the road, which was two miles in distance and ten minutes in time from the place and time of the collision, was held, in the light of connecting evidence, to be not too remote as matter of law to have been admitted. *Robson* v. *Lyford*, 318.

Circumstantial.

At the trial of a complaint under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, for permitting a building under the defendant's control to be used for prostitution, assignation and lewdness, where evidence has been introduced tending to show the control of the defendant over the house in question, two internal revenue receipts for taxes paid for the sale of intoxicating liquors issued to the defendant and found enclosed in envelopes in a desk in the house in question properly may be admitted in evidence as tending to corroborate the evidence in regard to the defendant's control over the house. *Commonwealth* v. *LaPointe*, 266.

It was held to have been proper for the judge presiding at the trial of two defendants upon a joint indictment for breaking and entering a dwelling house in the night time with the intent to commit larceny therein and for the larceny therein of divers articles of jewelry and precious stones to admit, under certain instructions limiting its use, evidence to show that neither of the defendants had worked for a year before their arrest and that neither of them had any visible means of support, and that, when arrested about two months after the burglary, they had in their possession money and jewelry, although none of the articles so found were identified as the property stolen or were shown to have come from the house that the defendants were charged with breaking and entering. *Commonwealth* v. *Coyne*, 269.

It was held that, at the trial of an action of contract against an executor by the administrator with the will annexed of the alleged widow of the defendant's testator for the amount of certain legacies bequeathed to her as such widow, upon the question, whether the widow survived her husband, they both having been killed in a limousine that was run into by a railroad train, there was evidence for the jury that the plaintiff's testatrix survived her husband and became entitled to the legacies. *Robson* v. *Lyford*, 318.

In a claim under the workmen's compensation act the Industrial Accident Board may be warranted in finding that an employee's death resulted from an injury arising out of and in the course of his employment on evidence that is wholly circumstantial. *Uzzio's Case*, 331.

In a claim under the workmen's compensation act by the dependent widow of the deceased workman employed in a mill and engaged in shovelling coal from cars, circumstantial evidence was held to warrant a finding by the Industrial Accident Board that the death of the employee resulted from an injury arising out of and in the course of his employment. *Ibid.*

In an action for enticing and seducing the plaintiff's wife and thereby depriving the plaintiff of connubial consortium, where there is evidence of inclination and opportunity for adultery between the plaintiff's wife and the defendant, the plaintiff may be allowed to prove that, after he had lived

apart from his wife for more than a year during a period when the defendant was living in the same house with the plaintiff's wife, the plaintiff's wife had a child. *Negus* v. *Foote*, 375.

In an action by the owner of a pasture adjoining a railroad location against the railroad corporation for the alleged poisoning of heifers belonging to the plaintiff, circumstantial evidence was held to have been insufficient to warrant a finding that arsenate of lead in certain kegs, assumed to have done the poisoning, was placed in the pasture by any negligence or wrongful act for which the defendant was responsible. *Gardner* v. *New York, New Haven, & Hartford Railroad*, 545.

On certain circumstantial evidence at the trial of a complaint under R. L. c. 100, § 1, for unlawfully keeping for sale intoxicating liquors with intent unlawfully to sell the same, it was held that the presiding judge rightly refused to order an acquittal or to rule that the defendant was entitled to an acquittal. *Commonwealth* v. *Ahern*, 547.

Declarations of Deceased Persons.

The preliminary decision of a presiding judge admitting in evidence a statement of a deceased person offered under R. L. c. 175, § 66, is not conclusive and, where all the evidence material to the question of the admission of the statement is contained in a bill of exceptions, the action of the judge may be reviewed by this court and can be held to be wrong because unsupported by any evidence. *Hasey* v. *Boston*, 516.

Decision of the judge presiding at the trial of an action against a city under R. L. c. 51, § 18, for personal injuries sustained by reason of an alleged defect in a sidewalk, admitting in evidence under R. L. c. 175, § 66, a statement of a deceased police officer made before the commencement of the action and taken down by shorthand, in which he said that "the leaves had fallen all over the sidewalks, and, as I understand it, she slipped on those leaves. . . . I did not hear of the accident until after the notice came. This is a brick sidewalk and the bricks are all in very good condition," was held to have been erroneous. *Ibid.*

At a trial where a declaration of a deceased person is offered in evidence under R. L. c. 175, § 66, it is right for the presiding judge to refuse to leave to the jury the preliminary questions determining whether the evidence is to be received, the statute making it the duty of the judge to decide those questions, leaving to the jury, if the evidence is admitted, its credibility and the weight to be attached to it. *McSweeney* v. *Edison Electric Illuminating Co.* 563.

Extrinsic affecting Writings.

Where a will purports to dispose of all of the property of the testator, evidence is not admissible, for the purpose of showing that the will did not operate as to an interest of the testator under the will of his mother and that the deceased was intestate as to such interest, which tends to show that the testator was of the opinion and believed that he had no interest under his mother's will and that he was so advised by his attorney. *Whitman* v. *Whitney*, 18.

In a suit in equity by the trustee under a will for instructions, where it appears

that by the clear terms of the will the proceeds from the sale of a certain house of the testatrix are given to a certain church corporation, a letter written by the testatrix dated nearly eight years after the date of her will and addressed to the executors of her will but not executed as a codicil, declaring her intention to make a change in her will in regard to the disposition of the proceeds from the sale of the house in question, is not admissible in evidence and cannot be considered by the court. *Taber* v. *St. Peter's Parish*, 312.

In an action of contract for the price of repairs made upon a motor car of the defendant, purchased by the defendant from the plaintiff under a contract in writing signed by the parties, which appeared on its face to be a complete contract embracing all the particulars necessary to make a perfect agreement, it was held that an oral agreement made before the contract in writing should have been excluded as evidence and, having been admitted, could not be considered, the rights of the parties being defined by their agreement in writing. *MacAlman* v. *Gleason*, 454.

Opinion: Experts.

An opinion as to the capacity of a testatrix, formed by one of the attesting witnesses to the will, who had not previously known the testatrix, after talking with the other attesting witnesses subsequently to the time of the execution of the will, where such witness states that she has no opinion based solely upon what she observed at the time the will was signed, is not admissible in evidence. *Holbrook* v. *Seagrave*, 26.

It is within the discretionary power of a presiding judge to determine whether a witness offered as an expert is qualified sufficiently to give an opinion on the matter in question. *Union Glass Co.* v. *Somerville*, 202.

As to action of a judge presiding at the trial of an action upon a bond of indemnity delivered in the State of New York, in permitting associate counsel for the plaintiff to testify as an expert witness as to the law of New York although he knew that law only by investigation and study, never having practised in that State, it was held with some hesitation under the circumstances of the trial, that it could not be said that the determination by the judge of the preliminary question of the qualification of the expert was clearly wrong, and that therefore it must stand. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

Privileged Communications.

At the trial of a controversy between the proponent of a will, who was the husband of the alleged testatrix and was made the residuary legatee by the proposed will, and the heirs at law of the signer of the instrument, who was alleged by the contestants to have been of unsound mind, an attorney at law, who did not draw the alleged will but had acted as the legal adviser of the alleged testatrix, properly may be permitted to testify as a witness for the contestants against the objection of the proponent of the will, that "two or three years ago he had a conversation with the testatrix when she came to consult him relative to difficulties" with her husband and may tell what she said to him in that conversation. *Panell* v. *Rosa*, 594.

Corroborative.

At the trial of a complaint under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, for permitting a building under the defendant's control to be used for prostitution, assignation and lewdness, where evidence has been introduced tending to show the control of the defendant over the house in question, two internal revenue receipts for taxes paid for the sale of intoxicating liquors issued to the defendant and found enclosed in envelopes in a desk in the house in question properly may be admitted in evidence as tending to corroborate the evidence in regard to the defendant's control over the house. *Commonwealth* v. *LaPointe*, 266.

It was held to have been proper for the judge presiding at the trial of two defendants upon a joint indictment for breaking and entering a dwelling house in the night time with the intent to commit larceny therein and for the larceny therein of divers articles of jewelry and precious stones to admit, under certain instructions limiting its use, evidence to show that neither of the defendants had worked for a year before their arrest and that neither of them had any visible means of support, and that, when arrested about two months after the burglary, they had in their possession money and jewelry, although none of the articles so found were identified as the property stolen or were shown to have come from the house that the defendants were charged with breaking and entering. *Commonwealth* v. *Coyne*, 269.

Self-serving Statement.

In an action on a covenant in a lease to pay rent, it was held that a statement made by the defendant's agent in the absence of the plaintiff that "he had not anything to do with" the demised premises, was excluded properly as a self-serving statement. *Taylor* v. *Kennedy*, 390.

Appearance of Witness.

Under St. 1915, c. 236, it is proper for an arbitration committee and the Industrial Accident Board to consider the personal appearance of the injured employee upon the witness stand in passing upon the question whether his seeming intelligence, health and aptitude for the work in which he was employed would have been likely to receive recognition by an increase of his wages by his employer if the injury had not been received. *Gagnon's Case*, 334.

Proof of Foreign Law.

As to action of a judge presiding at the trial of an action upon a bond of indemnity delivered in the State of New York, in permitting associate counsel for the plaintiff to testify as an expert witness as to the law of New York although he knew that law only by investigation and study, never having practised in that State, it was held with some hesitation under the circumstances of the trial that it could not be said that the determination by the judge of the preliminary question of the qualification of the expert was clearly wrong and that therefore it must stand. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

Of Handwriting.

In an action of contract by a physician for compensation for services rendered to the defendant's wife, the defence relied upon was that the defendant was living apart from his wife for justifiable cause and an issue was, whether certain letters of an incriminating nature, addressed to the husband, were genuine. Specimens of the handwriting of a certain woman who denied that she wrote the letters being in evidence, the letters were held properly to have been admitted for the purpose of comparison of handwriting to identify the writer of the letters, and also for the purpose of contradicting the testimony of the woman witness that she did not write the letters and never had seen them. *Leavitt* v. *Maynes*, 350.

In the same case it also was held that under the circumstances the contents of the letters were not admissible to show any tacit admission on the part of the defendant of the truth of the statements contained in them. *Ibid.*

Of Identity.

In an action upon a promissory note, it was stated in the bill of exceptions that the note produced "was printed upon yellow paper," whereas in answer to an interrogatory the plaintiff had stated that the note was not printed on yellow paper, and the defendant contended that he was entitled to go to the jury on the question of the identity of the note, but it was held that no question of identity was open to the defendant, as he had admitted on the witness stand that the note produced was signed by him and that it was the note described in the declaration. *Whitman* v. *Fournier*, 93.

Of Invitation.

In an action against a dealer who occupied a store with a basement beneath it where packages of goods delivered in the course of business were received, by one who to deliver a barrel entered the cellar when no one was around and fell, it was held that under the circumstances the plaintiff could not recover because he was not invited to enter the cellar, the fact that he found the door open which before he had found locked being no evidence of an implied invitation to enter. *Scanlon* v. *United Cigar Stores Co.* 481.

Proof of Judgment.

In a proceeding to enforce a mechanic's lien the final judgment is the decree of sale and this, like other judgments, can be proved only by the record or a certified copy of it. A warrant of sale following such a decree corresponds to an execution in an action at law and such a warrant, or a certified copy of it, is not competent evidence to prove the decree of sale. *Massasoit-Pocasset National Bank* v. *Borden*, 581.

Of Ownership or Control.

At the trial of a complaint under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, for permitting a building under the defendant's control to be used for prostitution, assignation and lewdness, where evidence has been

introduced tending to show the control of the defendant over the house in question, two internal revenue receipts for taxes paid for the sale of intoxicating liquors issued to the defendant and found enclosed in envelopes in a desk in the house in question properly may be admitted in evidence as tending to corroborate the evidence in regard to the defendant's control over the house. *Commonwealth* v. *LaPointe*, 266.

Corporation Returns to State Officers.

At the trial of a petition under St. 1906, c. 463, Part I, § 37, by a corporation for the assessment of damages to the petitioner's land and factories by changes of grade made in the abolition of the grade crossing of a railroad with a highway, where the president of the petitioner had testified as a witness, it was held to be within the discretion of the trial judge to admit in evidence, as bearing upon the credibility of the witness, the annual reports by the petitioner to the Secretary of the Commonwealth under St. 1903, c. 437, § 45, R. L. c. 110, § 51, and Pub. Sts. c. 106, § 54, a letter to the local assessor, and returns to the Tax Commissioner for certain years made under Pub. Sts. c. 13, § 38, as amended by R. L. c. 14, § 37. *Union Glass Co.* v. *Somerville*, 202.

In the same case it was held that the reports and returns, which were made before August 1, 1903, having been executed by the petitioner's officers, were competent evidence of value in behalf of the respondent. *Ibid.*

In the same case it was held that, in admitting the returns in evidence, the presiding judge should have instructed the jury to disregard the items stating the market value of the shares of the petitioner, as these statements, required by statute to be made for the information of the Tax Commissioner, did not represent that the market or trading value of its capital stock corresponded with the value of its real estate that had been damaged by the changes of grade. *Ibid.*

In the same case it was held that the admission in evidence of returns, made by the corporation to the Tax Commissioner after August 1, 1903, when St. 1903, c. 437, § 48, took effect, which made such returns confidential and privileged and no longer admissible in evidence as admissions, was a material error seriously prejudicial to the petitioner, and required that the exceptions should be sustained. Following Brackett *v.* Commonwealth, 223 Mass. 119, 126. *Ibid.*

In the same case it was said that it was not necessary to decide whether under St. 1913, c. 716, § 1, the error mentioned above would have been sufficient to require a new trial, as a substantial error was committed in admitting other evidence. *Ibid.*

Of State of Mind.

Evidence at the trial of an issue relating to the soundness of mind of a testatrix, which was held to justify a refusal to rule that there was no evidence that would justify a finding that the alleged testatrix was of unsound mind because the burden was on the proponent of the will to show that the alleged testatrix was of sound mind, and that with the evidence appearing in the record the general presumption of sanity did not as matter of law require a finding of testamentary capacity. *Panell* v. *Rosa*, 594.

Mere physical inability to move or to be moved about or to write is not evidence of "physical or mental incapacity" which enlarges the period of thirty days within which the statutory notice to a municipality of an injury to a traveller on a public way must be given. *Goodwin* v. *Fall River*, 529.

Of Survival.

It was held that, at the trial of an action of contract against an executor by the administrator with the will annexed of the alleged widow of the defendant's testator for the amount of certain legacies bequeathed to her as such widow, upon the question, whether the widow survived her husband, they both having been killed in a limousine that was run into by a railroad train, there was evidence for the jury that the plaintiff's testatrix survived her husband and became entitled to the legacies. *Robson* v. *Lyford*, 318.

In the same case testimony of the chauffeur who was operating the car at the time of the accident as to the relative position of the husband and of the wife at a certain point on the road, which was two miles in distance and ten minutes in time from the place and time of the collision, was held, in the light of connecting evidence, not too remote as matter of law, material and rightly to have been admitted. *Ibid.*

In the same case, it was held proper, under the circumstances, to permit a physician to testify that immediately before the day of the accident the wife was in a better condition of health than her husband, the evidence being competent upon the issue of survival. *Ibid.*

It also was held that, in the light of the other evidence on the question of survival, the defendant was not harmed by such evidence, even if immaterial, within the meaning of St. 1913, c. 716, § 1. *Ibid.*

Of Value.

Returns of a corporation to the Secretary of the Commonwealth and to the Tax Commissioner before August 1, 1903, were held to be competent evidence of value in behalf of the respondent at the trial of a petition by a corporation for the assessment of damages alleged to have been caused by the abolition of a grade crossing of a railroad with a highway. *Union Glass Co.* v. *Somerville*, 202.

In the same case it was held that, in admitting the returns in evidence, the presiding judge should have instructed the jury to disregard the items stating the market value of the shares of the petitioner, as these statements, required by statute to be made for the information of the Tax Commissioner, did not represent that the market or trading value of its capital stock corresponded with the value of its real estate that had been damaged by the changes of grade. *Ibid.*

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Of Violence of Stopping or Starting of Street Railway Car.

Testimony at the trial of an action against a corporation operating a street railway for personal injuries received by the plaintiff, who, while he was standing in the aisle of a car of the defendant with his hand in a strap, was thrown when the car "came to a very sudden stop with a terrible jerk," which was held to furnish evidence for the jury of negligence on the part of the defendant in the operation of the car. *Danofsky* v. *Boston Elevated Railway*, 97.

To Impeach Witness.

See WITNESS, *Impeachment.*

Testimony of Witness as to own Life Circumstances.

At the trial of an action of tort for personal injuries, where the plaintiff and the defendant both have testified as witnesses, it is within the discretionary power of the presiding judge to allow the plaintiff and the defendant each to be asked how many children and how much of a family he has in order to enable the jury to learn in a general way "what sort of a man is on the witness stand." *Luiz* v. *Falvey*, 253.

Admissibility for Limited Purpose.

In an action where the identity of the writer of certain letters of an incriminating nature was in issue, and the letters had been held to be admissible to impeach by contradiction a witness who had certified that she did not write them, it was held that under the circumstances the contents of the letters were not admissible to show any tacit admission on the part of the defendant of the truth of the statement contained in them. *Leavitt* v. *Maynes*, 350.

In the same case it was held that, the defendant not having asked the judge to restrict the effect of the letters to the identity of the handwriting and the impeachment of the witness, his general exception to their admission in evidence could not be sustained, as they were admissible for the purpose of such impeachment by contradiction. *Ibid.*

EXCEPTIONS.

In actions at law, see appropriate subtitle under PRACTICE, CIVIL.

To master's report in suit in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

EXECUTION.

Under the provision of R. L. c. 178, § 28, which provides that an officer who has served an execution shall post the notices of the execution "in a public place," a statement contained in the return of such an officer that he posted

the notice of the sale "in one place in the City of Salem, to wit, at the registry of deeds," shows a compliance with the statute without the use of the word "public" before the word "place." *Cunningham* v. *Bright*, 385.

EXECUTOR AND ADMINISTRATOR.

The court has no jurisdiction under R. L. c. 148, § 15, to authorize an executor to adjust by compromise a controversy concerning a will by an agreement to which trustees to whom property is devised and bequeathed by the will are not parties. *Ellis* v. *Hunt*, 39.

Failure of the executor of the will of a testator who died in France on December 1, 1911, a resident of a town in this Commonwealth, to file a list of the property of the decedent with the assessors of the town of his domicil before January, 1913, was held not to have been a compliance with the requirement of St. 1909, c. 490, Part I, § 73, so that the condition precedent to an abatement of the taxes upon the estate of the testator for the year 1912 had not been performed, and accordingly that such an abatement could not be made. *Parsons* v. *Lenox*, 231.

Want of knowledge of the law requiring the filing of such a sworn list is no excuse for delay in the filing. *Ibid.*

Upon cross appeals taken by an executor and by the conservator of the property of the testatrix from a decree of the Probate Court allowing with certain modifications the account of the conservator, the question of taxable costs rests wholly in the discretion of the single justice who hears the appeals. *Day* v. *Nichols*, 236.

Where a life interest had lapsed because the life beneficiary did not survive the testator, so that certain legatees in remainder became entitled to their legacies, it was held that, the will having provided that the pecuniary legacies should be paid by a trustee, the direction as to the payment of such legacies was in legal effect the same as if the testator had directed that they should be paid by the executor of his will, and accordingly that the usual rule was applicable, that an executor is not chargeable with interest on pecuniary legacies until the expiration of one year from the death of the testator. *Lyford* v. *McFetridge*, 285.

A suit in equity cannot be maintained by a widow to marshal the assets of her husband's estate by ordering the executor of his will to pay the debts and charges of administration out of the proceeds from the sale of real estate owned by him in a foreign country and not out of the assets of his estate in this Commonwealth. *Tod* v. *Mitchell*, 541.

EXPLOSIVES.

Action for personal injuries resulting from the explosion of dynamite left unexploded by a previous blast in blasting operations. *Cogliano* v. *Ferguson*, 147.

FENCE.

Review by LORING, J., of the successive statutes in regard to division fences between railroad locations and the land of adjoining owners. *New York Central & Hudson River Railroad* v. *Clarke*, 274.

Under the provision of St. 1879, c. 205, § 2, as now embodied in St. 1906, c. 463, Part II, § 104, an owner of land adjoining a railroad, who is bound by a covenant in a deed to make and maintain a division fence between his land and the location of the railroad, has the right at his election to build and maintain the division fence, and the right of the railroad corporation to build the fence at the reasonable expense of the landowner only arises when the landowner has elected not to perform the work himself. *New York Central & Hudson River Railroad*, 274.

A covenant in a deed to a railroad corporation that the grantor will and that his heirs, executors and administrators shall make and maintain at all times thereafter a good and sufficient fence or fences or wall or walls on the boundary lines between the grantor's own land and the granted premises, "which fences or walls shall be forever kept, maintained and made at my expense and the expense of my heirs, executors, administrators and assigns," is a covenant running with the land and binding on the grantor's successors in title. *Ibid.*

A fence, which has stood for thirty years, made of iron pickets about two feet high standing upon a stone curbing thirteen inches high, the front face of the curbing adjoining a public sidewalk and the nearest part of the iron fence being two inches back from the face of the curbing, cannot be found to constitute a nuisance. *Noyes* v. *Carr*, 339.

The owner of such a fence, on whose land it stands, owes no duty to a traveller on the adjoining sidewalk in regard to the fence except not to injure him by wilful, wanton or reckless conduct. *Ibid.*

FIRE.

Insurance against loss by fire, see appropriate subtitle under INSURANCE.

FRANCHISE.

Neither the right to hold an elective public office nor the right to vote is a property right within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Ashley* v. *Three Justices of Superior Court*, 63.

The provisions of the corrupt practices act impose no unconstitutional limitations upon the right to vote or the right to hold office. *Ibid.*

FRATERNAL BENEFICIARY CORPORATION.

In an action by a fraternal beneficiary corporation against a savings bank for the amount of deposits drawn out by the plaintiff's treasurer upon forged orders, remissness of the plaintiff's auditors, in failing to discover that the treasurer was misappropriating the funds of the corporation or was obtaining money from the savings bank on forged orders, was held not to be evidence that the corporation participated in the treasurer's fraud and not to require a finding that the corporation was so negligent in failing to discover the fraud as to lose its right to recover the amount paid by the bank on the forged orders. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

In the case stated above where the defendant relied, as an equitable defence under R. L. c. 173, § 28, on the facts that the plaintiff's dishonest treasurer, who drew $3,345 on forged orders out of the savings bank, used for himself only $250 and that the remaining $3,095 was deposited in another bank in the plaintiff's name and was used in paying sick benefits and other legal obligations of the plaintiff, a finding of the judge that the plaintiff could recover only $250 was held to be right. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

FRAUD.

In an action on a promissory note the defence of fraud in the making of the note is not open to the defendant unless it is set up in the answer. *Whitman* v. *Fournier*, 93.

Suit in equity to rescind contract procured by fraud. *Lefevre* v. *Chamberlain*, 294.

In a suit in equity brought in the name of an administrator for the alleged benefit of the creditors of the plaintiff's intestate to set aside a certain conveyance of real estate as having been made in fraud of creditors, it was held that the trial judge acted properly in confirming a finding by a master that the intestate had no actual intention of defrauding his creditors by the conveyance, and in refusing to confirm a finding of the master that the intestate was insolvent at the time he made the conveyance, because the facts disclosed no fraud in fact or in law. *Pitt* v. *Brouthers*, 298.

A conveyance of real estate can be avoided on the ground that it was made in fraud of creditors only by a creditor or by one who has the rights of a creditor. *Fuller* v. *Fuller*, 441.

In an action by a fraternal beneficiary corporation against a savings bank for the amount of deposits drawn out by the plaintiff's treasurer upon forged orders, remissness of the plaintiff's auditors, in failing to discover that the treasurer was misappropriating the funds of the corporation or was obtaining money from the savings bank on forged orders, was held not to be evidence that the corporation participated in the treasurer's fraud and not to require a finding that the corporation was so negligent in failing to discover the fraud as to lose its right to recover the amount paid by the bank on the forged orders. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

In a suit in equity to obtain the discharge of a mortgage upon personal property, where it appears that the mortgage was given to secure the mortgagee for his liability as indorser upon certain promissory notes for $1,400 and that these notes have been paid in full, it is no defence that the mortgage was made for an unnecessarily large sum and was given by the plaintiff for the purpose of deceiving and defrauding his creditors, which fraud was participated in by all the parties to the mortgage. *Murphy* v. *Moore*, 565.

FRAUDS, STATUTE OF.

Bill in equity by the son of the owner of certain real estate who had conveyed it to his sister by an absolute deed under an oral agreement that she should hold the land in trust for her own benefit during her life and that after

her death it should become the property of the plaintiff, and that, if the real estate should be converted into money, the proceeds from the sale should be held by the grantee to enjoy the income during her life and that on her death the grantor's son should be the sole beneficiary and owner of such proceeds, was maintained where the real estate was sold during the grantee's life, that part of the oral agreement relating to the proceeds of the sale being separate and distinct and enforceable as a valid oral trust in personal property. *Chace* v. *Gardner*, 533.

FRAUDULENT CONVEYANCE.

See appropriate subtitle under EQUITY JURISDICTION.

FRAUDULENT PREFERENCE.

See under BANKRUPTCY.

GENERAL COURT.

The provisions of the corrupt practices act that election petitions shall be entered in the Superior Court in Suffolk County is within the power of the General Court, and the respondent's right under art. 11 of the Declaration of Rights "to obtain right and justice freely" is not impaired thereby. *Ashley* v. *Three Justices of Superior Court*, 63.

GLOBE STREET RAILWAY COMPANY.

The provision of St. 1898, c. 578, § 11, relieving street railway corporations from all obligations as to surface repairs of streets, roads and bridges unless the obligation to do so had been imposed in a grant of original location, was not repealed nor superseded by St. 1911, c. 552, so as to revive such an obligation on the part of the Globe Street Railway Company. *Fall River* v. *Public Service Commissioners*, 575.

It was held that under the power conferred on the public service commission by St. 1913, c. 784, § § 20, 21, that commission properly might authorize the successor of the Globe Street Railway Company to discontinue the sale under certain conditions of six tickets for a sum not exceeding twenty-five cents, although the sale of such tickets was required as a condition in the grant of location of that railway company. *Ibid.*

GRADE CROSSING.

Petition under St. 1906, c. 463, Part I, § 37, for damages resulting from the abolition of a grade crossing of a railroad with a highway. *Union Glass Co.* v. *Somerville*, 202.

GROWING CROPS.

Growing crops, that were planted by a tenant at will in a part of a garden appurtenant to a tenement then occupied by him, continue to belong to him after his tenancy and occupation have been terminated by his landlord

giving a lease in writing to a third person of the building containing his tenement. *Commonwealth* v. *Galatta*, 308.

A lessee under a lease given him to terminate a tenancy at will, who pulls up and throws in a heap growing crops that were planted by the tenant at will, can be found guilty of wantonly destroying the personal property of another upon a complaint under St. 1904, c. 305. *Ibid.*

Neither § 105 nor § 106 of R. L. c. 208, particularly describes or mentions the wanton destruction of growing crops in a garden appurtenant to a tenement by a lessee lawfully in possession of the land. *Ibid.*

HARVARD UNIVERSITY.

It was held that, under the provisions of the will of Gordon McKay, Harvard University had no authority to make with the Massachusetts Institute of Technology an agreement whereby three fifths of the income of an endowment fund to promote applied science were to be devoted to an engineering school which should be carried on at the institute and be controlled and conducted by the institute, vesting practically in the institute the substantial organization, control, direction and administration of the work to be done under the agreement. *Harvard College* v. *Attorney General*, 396.

HIGHWAY.

See WAY, *Public.*

HOSPITAL.

Under the agreement of a corporation conducting a private hospital with a woman patient, who is about to have an operation performed there by her own surgeon after being etherized by her family physician, if, after the operation is performed and while the patient still is unconscious under the influence of ether, one of the two hospital nurses, who were present during the operation and assisted in carrying her to her room, forcibly pulls off a valuable ring from the patient's finger and steals it, this is a violation by the corporation of its duty to the patient under its contract, for which the patient may hold it liable in an action of tort. *Vannah* v. *Hart Private Hospital*, 132.

If the plaintiff in the case described above when received into the hospital had been asked to put all her "valuables" into the custody of the hospital and had failed to comply with the request in regard to her rings, this would have been a defence to the action, because then the duty owed by the corporation under its contract would not have extended to the care of the rings on the patient's fingers. *Ibid.*

If, however, the plaintiff merely was asked to put her money into the custody of the hospital but was not asked to put anything else into its custody, the defence would not be made out. *Ibid.*

HUSBAND AND WIFE.

By Pub. Sts. c. 135, § 3, as amended by Sts. 1882, c. 141; 1885, c. 276, under certain circumstances, the widow of a second son of a testatrix became

entitled to one half of an interest which had vested in her husband under the provisions of his mother's will. *Whitman* v. *Whitney*, 18.

The words of St. 1914, c. 464, do not include "loss or damage" suffered by a husband by reason of the physical injury of his wife, such consequential financial loss not being a "bodily injury" within the meaning of the statute. *Williams* v. *Nelson*, 191.

A married woman may bind her separate estate by an express promise, or by conduct and words from which a promise may be inferred, to pay for necessaries furnished to her while living with her husband. *Charron* v. *Day*, 305.

In an action of contract by a physician for compensation for services rendered to the defendant's wife, the defence relied upon was that the defendant was living apart from his wife for justifiable cause and an issue was, whether certain letters of an incriminating nature, addressed to the husband, were genuine. Specimens of the handwriting of a certain woman who denied that she wrote the letters being in evidence, the letters were held properly to have been admitted for the purpose of comparison of handwriting to identify the writer of the letters, and also for the purpose of contradicting the testimony of the woman witness that she did not write the letters and never had seen them. *Leavitt* v. *Maynes*, 350.

In the same case it also was held that under the circumstances the contents of the letters were not admissible to show any tacit admission on the part of the defendant of the truth of the statement contained in them. *Ibid.*

In an action for enticing and seducing the plaintiff's wife and thereby depriving the plaintiff of connubial consortium, where there is evidence of inclination and opportunity for adultery between the plaintiff's wife and the defendant, the plaintiff may be allowed to prove that, after he had lived apart from his wife for more than a year during a period when the defendant was living in the same house with the plaintiff's wife, the plaintiff's wife had a child. *Negus* v. *Foote*, 375.

In an action against a husband and wife jointly on a promissory note signed by both of them as makers, where it appears that the wife signed the note as a joint and several maker with full knowledge of its tenor and that the note was given for money lent by the plaintiff to the husband to be secured by a mortgage of the husband's real estate, a good consideration for the wife's promise is shown. *Willard* v. *Greenwood*, 549.

INCOME AND CAPITAL.

See CAPITAL AND INCOME.

INDUSTRIAL ACCIDENT BOARD.

See WORKMEN'S COMPENSATION ACT.

INSANE PERSON.

Description by CARROLL, J., of the relation of a conservator appointed under R. L. c. 145, §§ 40, 41, as amended by St. 1910, c. 95, to the property of his ward. *Day* v. *Old Colony Trust Co.* 225.

Accountability of a bank to a conservator for the amount of a deposit made by the conservator in his own name as conservator for his ward. *Day* v. *Old Colony Trust Co.* 225.

INSOLVENT ESTATE OF DECEASED PERSON.

On an appeal from a decree of the Probate Court, where the question was not open under the objections filed, it was held that it was unnecessary to consider whether the appealing party was a creditor of a certain deceased person and, if he was, whether such a creditor, after the estate of the deceased person had been represented insolvent, was a person aggrieved within the meaning of R. L. c. 162, § 9, by a decree of the Probate Court granting a license to sell real estate of the deceased for the payment of debts. *Murray* v. *Fiorentini*, 466.

An appointment of property made by the donee of a testamentary power to a creditor of such donee for the purpose of discharging the obligation of a guaranty in writing, where the estate of the donee has been represented insolvent and commissioners have been appointed under R. L. c. 142, § 2, gives the appointee no priority over other creditors to the donee's estate. *Vinton* v. *Pratt*, 468.

INSPECTION.

Building Inspector, see that title.

INSURANCE.

Life.

Where, at the trial of an action on a policy of life insurance, the defence relied upon was that the insured, among other false representations in his application for the policy, falsely represented that he never had cancer or tumor and was then in good health, and the judge ordered a verdict for the defendant, it was held that, the burden being on the defendant to show that the misstatements of the insured were made in bad faith or that their falsity increased the risk, the question of fact should have been submitted to the jury. *McDonough* v. *Metropolitan Life Ins. Co.* 450.

In the same case it was said that, even if the presiding judge felt that the evidence establishing the fact that the insured had the disease was so overwhelming that a verdict disregarding it ought not to be permitted to stand, it was wrong to order a verdict for the defendant. *Ibid.*

Endowment.

If an experienced business man makes an application in writing to a life insurance company for a "thirty year endowment policy" for the benefit of his wife, there is no ambiguity as to the kind of policy applied for. *Hayes* v. *Penn Mutual Life Ins. Co.* 122.

Therefore the insured, after the death of his wife before the expiration of the endowment period, cannot maintain a suit in equity to change the binding force of the contract by reason of his own alleged undisclosed mistake in

thinking that the policy made the insurance money payable to himself in case he should be living when the thirty year period expired. *Hayes* v. *Penn Mutual Life Ins. Co.* 122.

In such a suit in equity brought by the insured to have the policy cancelled and the amount of the premiums repaid to him, it was held that the plaintiff and his wife, having accepted the policy, could not deprive the insurance company of its rights under it by neglecting to read it, and that it would be inequitable to compel the insurance company to return the premiums. *Ibid.*

In the same case the bill sought as alternative relief to have the plaintiff given an equitable lien upon the insurance money to the extent of the premiums paid by him, and it was held, without intimating that such a claim existed, that the insurance company should not be kept in court for the purpose of establishing on this bill a possible claim by the plaintiff against the representative of his deceased wife as the beneficiary of the policy. *Ibid.*

Fire.

A provision contained in a policy of fire insurance, that "It is made a condition of this contract that the total insurance permitted, including the amount of this policy, is limited to $7,600," where the policy also contains the provision, that "This policy shall be void if . . . the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company," is an absolute condition, the violation of which prevents a recovery on the policy. *Smith* v. *Middlesex Mutual Fire Ins. Co.* 301.

A contract of fire insurance, made upon property already insured under other policies to the amount of $7,600, which is issued to the insured by an agent of the insurance company with his written permission as the "special agent" of the company, and which bears a "form" or "rider" attached to it signed by the agent "as agent" in the manner provided by St. 1907, c. 576, § 60, cl. 7, containing the words, "Other Insurance Permitted," is a valid contract of insurance upon the property in question creating an excess over $7,600 of all the insurance on the property. *Ibid.*

Against Liability.

Under the provision in St. 1914, c. 464, regulating the payment of losses under contracts for casualty insurance, a "loss occurs on account of a casualty," not when the casualty happens, but when the damages resulting from that casualty have been fixed by the judgment of a court. *Lorando* v. *Gethro*, 181.

In further interpretation of the same clause it was held that the liability of the insurance company becomes "absolute" in the sense that the amount of the loss thereafter shall not be open to dispute, and the clause does not prohibit any ground of defence that ordinarily would be open to the insurer in an action brought against it by the insured on the policy. *Ibid.*

The Superior Court, under its general chancery jurisdiction, has jurisdiction of suits in equity brought under St. 1914, c. 464, by those who have obtained judgments for bodily injury or death by accident against defendants who were insured against such loss or damage when the right of action

arose, to reach and apply the insurance money to the satisfaction of such judgments. *Williams* v. *Nelson*, 191.

In a suit in equity under St. 1914, c. 464, to reach and apply the money recoverable under a policy of casualty insurance to the satisfaction of a judgment obtained by the plaintiff against the insured for injuries sustained by being hit by an automobile of the insured, it was held that the evidence warranted a finding that at the time of the plaintiff's injury the automobile was "driven or manipulated," within the meaning of those words in the policy, by the insured and not by his son who was less than sixteen years of age and just previously had been driving, so that the defendant was not freed from liability under a provision of the policy which applied if the automobile was being driven by one under sixteen years of age. *Ibid.*

In the same suit it was held that the case was one within St. 1914, c. 464, the words "loss or damage" including a case where the insured has been held responsible to the extent of the rendition of a judgment against him, although no payment has been made on the judgment. *Ibid.*

The words of St. 1914, c. 464, quoted above do not include "loss or damage" suffered by a husband by reason of the physical injury of his wife, such consequential financial loss not being a "bodily injury" within the meaning of the statute. *Ibid.*

The above statute is constitutional. *Ibid.*

"Other Insurance."

It is the settled law of this Commonwealth that a valid subsequent insurance, made in violation of a limitation or condition in a prior policy, avoids such prior policy. *Smith* v. *Middlesex Mutual Fire Ins. Co.* 301.

A contract of fire insurance, made upon property already insured under other policies to the amount of $7,600, which is issued to the insured by an agent of the insurance company with his written permission as the "special agent" of the company, and which bears a "form" or "rider" attached to it signed by the agent "as agent" in the manner provided by St. 1907, c. 576, § 60, cl. 7, containing the words, "Other Insurance Permitted," is a valid contract of insurance upon the property in question creating an excess over $7,600 of all the insurance on the property. *Ibid.*

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INTENT.

Evidence of intent and state of mind, see appropriate subtitle under EVIDENCE.

INTEREST.

Interest was allowed upon an amount found by a master as damage suffered by the plaintiff in a suit for the enjoining of unlawful interference with his business, and for damages. *Aronson* v. *Orlov*, 1.

Upon a bill for instructions by the trustees under the will of Edwin Ginn, it was held as to certain legacies which became due only upon the happening of the contingency that principal of the estate had become available for such payment after satisfying all prior legacies, absolute and contingent, that event should be considered to have happened on April 11, 1916, and not before, and that therefore the absolute legacies should bear interest from that date at the rate of four per cent per annum in accordance with St. 1915, c. 151, § 2. *Parkhurst* v. *Ginn*, 159.

In an action to enforce payment to the mayor of Cambridge of the salary of $5,000 per year in accordance with an ordinance passed on March 21, 1916, under the circumstances it was held that the mayor was entitled to interest on three months' salary from April 10, 1916, and to interest on the salary for each of the other months from the tenth day of the month next succeeding the month for which the salary became due. *Mayor of Cambridge* v. *Cambridge*, 249.

Where a life interest had lapsed because the life beneficiary did not survive the testator, so that certain legatees in remainder became entitled to their legacies, it was held that, the will having provided that the pecuniary legacies should be paid by a trustee, the payment of such legacies was in legal effect the same as if the testator had directed that it should be paid by the executor of his will, and accordingly that the usual rule was applicable, that an executor is not chargeable with interest on pecuniary legacies until the expiration of one year from the death of the testator. *Lyford* v. *McFetridge*, 285.

INTERFERENCE.

Unlawful Interference, see that title.

INTERROGATORIES.

See that subtitle under Practice, Civil.

INTOXICATING LIQUORS.

On certain circumstantial evidence at the trial of a complaint under R. L. c. 100, § 1, for unlawfully keeping for sale intoxicating liquors with intent unlawfully to sell the same, it was held that the presiding judge rightly refused to order an acquittal or to rule that the defendant was entitled to an acquittal. *Commonwealth* v. *Ahern*, 547.

On a complaint under R. L. c. 100, § 1, charging that the defendant "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same," the defendant can be convicted on proof of keeping with intent to sell unlawfully without any evidence of exposing liquors for sale. *Ibid.*

INVITED PERSON.

See that subtitle under NEGLIGENCE.

JOINT TENANTS AND TENANTS IN COMMON.

Upon findings of a master, in a suit in equity to compel a defendant to remove an alleged permanent structure built by him on a part of a small island owned in common by a number of persons, including the plaintiff and that defendant, as to the character of the island and of the structure, it was held that it must be taken that the building erected by the defendant was a permanent structure and that accordingly an injunction for its removal must be granted. *Muskeget Island Club* v. *Prior*, 95.

JOINT TORTFEASORS.

Where two persons are sued in separate actions for the same cause of action and a judgment for the full amount of damages with costs is entered against each of them, if one of them pays the judgment in full, this discharges the other from his liability for the damages but he still is liable for the costs awarded against him. *Ryan* v. *Annelin*, 591.

Under the authority given to a trial judge by R. L. c. 203, § 9, where two cases are tried together, to "reduce the witness fees and other costs," if the two cases are against different persons and each for the same cause of action and a recovery is had against each of the defendants, although the judge may order that only one set of costs shall be recovered provided that appears to be just, he is not obliged to make such an order, and, after a separate judgment for the full amount of damages with costs has been entered against each defendant, it is not possible to make such a readjustment. *Ibid.*

JUDGMENT.

If a plaintiff in a suit in equity can show that a certain decree made in another suit in equity was erroneous, that does not tend to show that the court which made the erroneous decree had no jurisdiction to make it. *Kirby* v. *Donovan*, 86.

In a suit in equity to enjoin the defendants from enforcing a certain bond given to dissolve a temporary injunction in another suit and signed by the plaintiff as principal, on the ground that the interlocutory decree granting the temporary injunction was void because procured by collusion, it was held that the bill properly was dismissed, where the single justice found that the defendant in the other suit had determined in some way to injure the plaintiff in the present suit financially, but did not find that the plaintiff in the other suit had conspired with the defendant in the other suit to carry that determination into effect. *Ibid.*

Under R. L. c. 128, § 37, which provides that a registration of title by the Land Court shall bind the land and quiet the title thereto and shall be conclusive upon and against all persons, a decree of that court, that the title to certain land is in W as trustee, is not contradicted nor falsified by showing that W was trustee only for himself and that the words of the decree

meant simply that the title was in W as an individual. *Cunningham* v. *Bright*, 385.

In a proceeding to enforce a mechanic's lien the final judgment is the decree of sale and this, like other judgments, can be proved only by the record or a certified copy of it. *Massasoit-Pocasset National Bank* v. *Borden*, 581.

A warrant of sale following such a decree corresponds to an execution in an action at law and such a warrant, or a certified copy of it, is not competent evidence to prove the decree of sale. *Ibid.*

In the action above described it was said that there is no statute nor any principle of public policy that requires an inferior court with a pecuniary limit to its jurisdiction, upon proof of the breach of a bond on which an action is brought, to enter judgment for the full penalty of the bond in excess of the *ad damnum* of the writ which is all that the plaintiff asks for. *Ibid.*

Where two persons are sued in separate actions for the same cause of action and a judgment for the full amount of damages with costs is entered against each of them, if one of them pays the judgment in full, this discharges the other from his liability for the damages but he still is liable for the costs awarded against him. *Ryan* v. *Annelin*, 591.

Under the authority given to a trial judge by R. L. c. 203, § 9, where two cases are tried together, to "reduce the witness fees and other costs," if the two cases are against different persons and each for the same cause of action and a recovery is had against each of the defendants, although the judge may order that only one set of costs shall be recovered provided that appears to be just, he is not obliged to make such an order, and, after a separate judgment for the full amount of damages with costs has been entered against each defendant, it is not possible to make such a readjustment. *Ibid.*

JURISDICTION.

Previous to the issuance of a patent, no case can arise under the patent laws respecting the relative rights of the parties to or under a patent, such that the exclusive jurisdiction of the case would be in the United States courts. *Aronson* v. *Orlov*, 1.

Although, in a certain suit to enjoin unlawful interference with the business of the plaintiffs by two former employees and a third person, there were allegations by both the plaintiffs and the defendants of rights under assignments of applications for patents, it was held that the State court had jurisdiction of the suit, both because it did not appear that any patent had been granted and because the gravamen of the suit was the malicious and wrongful interference with the plaintiffs' business and not an infringement of rights under a patent or an application therefor. *Ibid.*

A writ of prohibition will not be issued to correct errors or irregularities of a tribunal that is acting within its jurisdiction, and can be invoked only to prevent such tribunal from exercising a jurisdiction that it does not possess. *Ashley* v. *Three Justices of Superior Court*, 63.

In an election petition brought under St. 1914, c. 783, § 10, charging a violation of the provisions of the corrupt practices act a plea in abatement, setting up a defence that the subpoena had been made returnable in fifteen days instead of fourteen days after the filing of the petition, was held to

be within the jurisdiction of the Superior Court and not to be open upon a petition for a writ of prohibition, filed a few days after the plea. *Ashley* v. *Three Justices of Superior Court*, 63.

If a plaintiff in a suit in equity can show that a certain decree made in another suit in equity was erroneous, that does not tend to show that the court which made the erroneous decree had no jurisdiction to make it. *Kirby* v. *Donovan*, 86.

It is settled that the jurisdiction of a district court, so far as it depends on the amount to be recovered, is to be decided by the *ad damnum* in the writ. *Massasoit-Pocasset National Bank* v. *Borden*, 581.

An action on a bond for $4,000 given to dissolve a mechanic's lien may be brought in a district court whose jurisdiction is limited to claims of $1,000 if the *ad damnum* set forth in the writ is only $1,000. *Ibid.*

In the action above described it was said that there is no statute nor any principle of public policy that requires an inferior court with a pecuniary limit to its jurisdiction, upon proof of the breach of a bond on which an action is brought, to enter judgment for the full penalty of the bond in excess of the *ad damnum* of the writ which is all that the plaintiff asks for. *Ibid.*

Where a foreign corporation actually doing business in this Commonwealth has been brought within the jurisdiction of a court of this Commonwealth by the service under St. 1913, c. 257, of a writ upon its agent, who is a resident of this Commonwealth, voluntarily appointed by it to have charge of its business here, it becomes answerable in this jurisdiction to any transitory cause of action, including an action at law on promissory notes made and negotiated by it in another State. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

Defendant was held not entitled to set up in an action at law which previously had been a suit in equity a plea in abatement that the court had no jurisdiction of the case because of lack of service upon the defendant, a foreign corporation, where it appeared that the question had been decided for the plaintiff while the suit was in equity. *Ibid.*

In the same case it was said that the plaintiff, by filing a replication to the plea to the jurisdiction of the court in the suit in equity before the amendment into an action at law, did not waive his right to object to the reopening in the action at law of the issues disposed of in the suit in equity before the amendment. *Ibid.*

Of the Industrial Accident Board. *Levangie's Case*, 213.

Jurisdiction of the Supreme Judicial Court on appeal from the Probate Court. *Day* v. *Nichols*, 236.

EQUITY JURISDICTION, see that title.

Of LAND COURT and of PROBATE COURT, see subtitles under those titles.

JURY AND JURORS.

Trial by jury is not essential to the due process of law secured by the Fourteenth Amendment to the Constitution of the United States. *Ashley* v. *Three Justices of Superior Court*, 63.

The provision in regard to trial by jury in the Seventh Amendment to the Constitution of the United States relates only to the courts of the United States. *Ibid.*

The provisions of the corrupt practices act contained in St. 1913, c. 835, § 497, as amended by St. 1914, c. 783, § 12, considered in connection with the Fortieth Amendment to the Constitution, do not give the respondent in an election petition a constitutional right to a trial by jury thereon. *Ashley* v. *Three Justices of Superior Court*, 63.

Article 15 of the Declaration of Rights does not apply to an election petition under the statute named above; because the right to hold an office to which one has been elected is not "property" within the meaning of the word as used in the Declaration of Rights and a proceeding upon an election petition is not a "suit between two or more persons" in the sense in which those words there are used. *Ibid.*

One, who under St. 1913, c. 655, § 55, has appealed to a judge of the Superior Court from an order of a building inspector applying for an order forbidding the enforcement of the order of the inspector, cannot be heard in that proceeding to contend that the statute of which he is taking advantage is unconstitutional in not providing for a trial by jury as to the establishment of the fundamental facts on which the jurisdiction of the inspector rested. *Stevens, landowner*, 368.

The statute quoted above is not unconstitutional in its operation upon the landowner in failing to provide for a trial by jury in connection with the review by a judge of the Superior Court of the order of the inspector. *Ibid.*

Whether a person who has taken such an appeal to a judge of the Superior Court, if afterwards a criminal prosecution or proceedings in equity should be instituted against him for failure to comply with the requirements imposed by the order of the building inspector, would have a right to a trial by jury, here was referred to as a question that was not before the court. *Ibid.*

LAND COURT.

Jurisdiction.

St. 1915, c. 112, purporting to confer on the Land Court jurisdiction under certain circumstances to register the title to a petitioner's land free from equitable restrictions, where the petitioner has paid into court a sum found to be a proper compensation, is unconstitutional and void, because the taking of property for a private purpose without the consent of its owner upon payment of full compensation is a violation of arts. 1, 10 of the Declaration of Rights and cannot be authorized by statute. *Riverbank Improvement Co.* v. *Chadwick*, 242.

Decree.

Under R. L. c. 128, § 37, which provides that a registration of title by the Land Court shall bind the land and quiet the title thereto and shall be conclusive upon and against all persons, a decree of that court, that the title to certain land is in W as trustee, is not contradicted nor falsified by showing that W was trustee only for himself and that the words of the decree meant simply that the title was in W as an individual. *Cunningham* v. *Bright*, 385.

LANDLORD AND TENANT.

Tenancy at Will.

A lessee under a lease given him to terminate a tenancy at will, who pulls up and throws in a heap growing crops that were planted by the tenant at will, can be found guilty of wantonly destroying the personal property of another upon a complaint under St. 1904, c. 305. *Commonwealth* v. *Galatta*, 308.

Growing crops, that were planted by a tenant at will in a part of a garden appurtenant to a tenement then occupied by him, continue to belong to him after his tenancy and occupation have been terminated by his landlord giving a lease in writing to a third person of the building containing his tenement. *Ibid.*

Construction of Lease.

In a suit in equity by a lessee to reform a lease to him of the basement of a business building and for an abatement of rent, a finding by the trial judge that "the whole basement under the building leased to the plaintiff includes the space under the sidewalk and outside the vertical plane of the walls of the building," was held under the circumstances to have been warranted. *Arafe* v. *Howe*, 46.

Where the parties to a lease have put upon it a certain construction as to the extent of the premises covered by it, which is not contrary to its terms and is not forbidden by any rule of law, both parties will be bound by such construction. *Ibid.*

Where a lease of a basement of a business building provided that the lessors might "introduce additional machinery, pipes, wires or fixtures, if they should elect so to do," this was held to authorize the placing by the lessor of steam or water pipes in the basement during the term of the lease. *Ibid.*

Agreement subsequent to Lease varying its Terms.

Where the lessor of a basement in a business building, finding it necessary, in order to make alterations in a store above, to erect certain posts and stringers in the basement, made an agreement in writing with the lessee of the basement that the lessor should be permitted to erect the posts and stringers as shown on a certain plan attached to the agreement and that the lessee should have a yearly reduction of rent, it was held, that the closing up of a window in a toilet room, made necessary by the changes, gave the lessee no right to relief in equity by damages or otherwise. *Arafe* v. *Howe*, 46.

Assignment: Sale of Land by Landlord.

A conveyance of land subject to a lease operates as an assignment of the lease and not merely as a grant of the reversion, and, if the lessee is sued by the grantee of the land on his covenant in the lease to pay rent, he cannot set up in defence an oral agreement between the original lessor and his grantee whereby such lessor is given the right to receive the accruing rent until the end of the term. *Taylor* v. *Kennedy*, 390.

Where a lessor of land sells and conveys the land subject to the lease, with

no reservation of the rent, the grantee by force of the conveyance becomes entitled, as a part of the realty, to receive all rent thereafter accruing, no attornment being necessary to create privity of estate between the grantee of the lessor and the lessee. *Taylor* v. *Kennedy*, 390.

Reformation of Lease.

In a suit in equity by a lessee to reform a lease to him of the basement of a business building and for an abatement of rent, a finding by the trial judge that "the whole basement under the building leased to the plaintiff includes the space under the sidewalk and outside the vertical plane of the walls of the building," was held under the circumstances to have been warranted. *Arafe* v. *Howe*, 46.

In the same suit, where the trial judge made a finding that the plaintiff because of the presence of the structure was entitled to a reduction of rent and the ground on which the finding was made did not appear in the record, it was held that the defendant would not be liable in damages unless the structure under the sidewalk was erected and maintained upon the leased premises by his authority or consent express or implied. *Ibid.*

It also was held that, in any event, the assessment of damages was erroneous, as the judge had no power to change the contract between the parties, and, if the plaintiff should be entitled to damages, the total amount must be assessed in one sum which the defendants should be ordered to pay to the plaintiff. *Ibid.*

In the suit above described it was ordered that the decree should be reversed and that the case should stand for hearing upon the question, whether the structure in the basement under the sidewalk was placed there and afterwards maintained by license or authority of the defendants, and that, if it should be found that it was, the damages sustained by the plaintiff by reason thereof should be determined. *Ibid.*

Surrender.

In an action on a covenant in a lease to pay rent the burden of proof is on the defendant to establish an alleged surrender of the lease. *Taylor* v. *Kennedy*, 390.

In an action on a covenant in a lease to pay rent, in which the defence relied upon is an alleged surrender of the lease, where the defendant has introduced evidence of an agreement made in behalf of a proposed corporation to take a lease of the premises for a term of years, the plaintiff properly may be allowed to show that the proposed lease was not to be executed unless the corporation was formed, which never was done, and that the agreement was subject to the existing lease. *Ibid.*

Eviction.

In an action on a covenant in a lease to pay rent, where the defence relied upon is an alleged eviction, the plaintiff properly may be allowed to introduce evidence to explain his receipt of rent from a third person in order to show that it raised no presumption of an intention to evict the defendant who never had been ousted. *Taylor* v. *Kennedy*, 390.

In the same case it was held that certain dealings with the key of the demised premises, while clearly admissible as evidence to show the conduct of the parties, were not conclusive proof of an eviction of the defendant which absolved him from the obligation to pay rent. *Taylor* v. *Kennedy*, 390.

Peaceful Possession.

Where the lessor of a basement in a business building, finding it necessary, in order to make alterations in a store above, to erect certain posts and stringers in the basement, made an agreement in writing with the lessee of the basement that the lessor should be permitted to erect the posts and stringers as shown on a certain plan attached to the agreement and that the lessee should have a yearly reduction of rent, it was held, that the closing up of a window in a toilet room, made necessary by the changes, gave the lessee no right to relief in equity by damages or otherwise. *Arafe* v. *Howe*, 46.

In the same suit in equity brought by the lessee against his lessor it was held that the plaintiff was entitled to no relief or damages for any interference with or impairment of the ventilation of the toilet room caused by the closing up of the window. *Ibid.*

In the same suit it was held that this court could not say that a finding of the trial judge was not warranted to the effect that "the plaintiff was not at fault for refusing to permit attempts at repairing injury not explained to him." *Ibid.*

In the same suit it was held that the plaintiff was entitled to no damages by reason of the impairment of the ventilation and light of the basement caused by the lessor placing in the basement pipes which he had a right to place there under the terms of the lease, there being no evidence to show that the lessor in exercising his right to place the pipes there did not act reasonably and in good faith. *Ibid.*

Growing Crops.

Growing crops, that were planted by a tenant at will in a part of a garden appurtenant to a tenement then occupied by him, continue to belong to him after his tenancy and occupation have been terminated by his landlord giving a lease in writing to a third person of the building containing his tenement. *Commonwealth* v. *Galatta*, 308.

A lessee under a lease given him to terminate a tenancy at will, who pulls up and throws in a heap growing crops that were planted by the tenant at will, can be found guilty of wantonly destroying the personal property of another upon a complaint under St. 1904, c. 305. *Ibid.*

Neither § 105 nor § 106 of R. L. c. 208 particularly describes or mentions the wanton destruction of growing crops in a garden appurtenant to a tenement by a lessee lawfully in possession of the land. *Ibid.*

Breach of Covenants by Lessor.

In an action on a covenant in a lease to pay rent it was said that, if a certain averment in the answer was to be treated as a pleading in recoupment, the defendant, while denying that the covenant to pay rent was in force against

him, could not rely on alleged breaches by his lessor of covenants in the same lease as a ground for damages. *Taylor* v. *Kennedy*, 390.

Landlord's Liability in Tort to Tenant's Employee.

In an action by an employee in a building against the owner of the building, her employer's landlord, for personal injuries caused by an insufficiently lighted stairway, it was held, as to a certain covenant in the lease of the defendant to the plaintiff's employer, that, whatever might be the respective rights of the landlord and the tenant under this covenant, it did not deprive the plaintiff of her remedy against the owner of the building, whose negligence caused her injury. *Maran* v. *Peabody*, 432.

LARCENY.

It was held to have been proper for the judge presiding at the trial of two defendants upon a joint indictment for breaking and entering a dwelling house in the night time with the intent to commit larceny therein and for the larceny therein of divers articles of jewelry and precious stones to admit, under certain instructions limiting its use, evidence to show that neither of the defendants had worked for a year before their arrest and that neither of them had any visible means of support, and that, when arrested about two months after the burglary, they had in their possession money and jewelry, although none of the articles so found were identified as the property stolen or were shown to have come from the house that the defendants were charged with breaking and entering. *Commonwealth* v. *Coyne*, 269.

LAW OF THE ROAD.

Conduct of the driver and owner of a motor car in driving on a highway between eight and nine o'clock in the evening, in violation of the law of the road, from behind on the right of a carriage, where he is run into by a street railway car, was held under the circumstances not as matter of law to overcome the presumption of his due care created by St. 1914, c. 553. *Bailey* v. *Worcester Consolidated Street Railway*, 477.

LEGACY.

See DEVISE AND LEGACY.

LEGITIMACY.

Where the will of a testatrix gave the residue of her property, upon the termination of a life interest, to the "lineal descendants then living" of her grandfather, it was held that the "lineal descendants then living" must be those recognized as such by the law of this Commonwealth, that by such law the *status* of the sons of the grandchild as to legitimacy was dependent upon the law of their domicil unless that was contrary to the statute law or the public policy of this Commonwealth, and that the law of their domicil, Indiana, showed that certain sons, born of another grandchild of the grand-

father and a woman who in good faith thought she was a wife although she was not, were legitimate, so that they were entitled to share equally with a legitimate child as his lineal descendants. *Green* v. *Kelley*, 602.

LETTER.

In an action of contract by a physician for compensation for services rendered to the defendant's wife, the defence relied upon was that the defendant was living apart from his wife for justifiable cause and an issue was, whether certain letters of an incriminating nature, addressed to the husband, were genuine. *Leavitt* v. *Maynes*, 350.

Specimens of the handwriting of a certain woman who denied that she wrote the letters being in evidence, the letters were held properly to have been admitted for the purpose of comparison of handwriting to identify the writer of the letters, and also for the purpose of contradicting the testimony of the woman witness that she did not write the letters and never had seen them. *Ibid.*

In the same case it also was held that under the circumstances the contents of the letters were not admissible to show any tacit admission on the part of the defendant of the truth of the statement contained in them. *Ibid.*

In the same case it was held that, the defendant not having asked the judge to restrict the effect of the letters to the identity of the handwriting and the impeachment of the witness, his general exception to their admission in evidence could not be sustained, as they were admissible for the purpose of such impeachment by contradiction. *Ibid.*

LIEN.

MECHANICS' LIEN, see that title.

MALICIOUS INTERFERENCE.

See UNLAWFUL INTERFERENCE.

MANDAMUS.

Upon a report by a single justice who heard a petition for a writ of mandamus, which is a proceeding at law, this court has no jurisdiction to change or reverse a decision as to the facts made by the single justice who heard the case unless the finding of fact is not warranted by the evidence. *Mansfield* v. *Secretary of the Commonwealth*, 262.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MARSHALLING OF ASSETS.

See appropriate subtitle under EQUITY JURISDICTION.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY.

It was held that, under the provisions of the will of Gordon McKay, Harvard University had no authority to make with the Massachusetts Institute of Technology an agreement whereby three fifths of the income of an endowment fund to promote applied science were to be devoted to an engineering school which should be carried on at the institute and be controlled and conducted by the institute, vesting practically in the institute the substantial organization, control, direction and administration of the work to be done under the agreement. *Harvard College* v. *Attorney General*, 396.

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability;* WORKMEN'S COMPENSATION ACT.

MECHANIC'S LIEN.

In a proceeding to enforce a mechanic's lien the final judgment is the decree of sale and this, like other judgments, can be proved only by the record or a certified copy of it. *Massasoit-Pocasset National Bank* v. *Borden*, 581.

A warrant of sale following such a decree corresponds to an execution in an action at law and such a warrant, or a certified copy of it, is not competent evidence to prove the decree of sale. *Ibid.*

An action on a bond for $4,000 given to dissolve a mechanic's lien may be brought in a district court whose jurisdiction is limited to claims of $1,000 if the *ad damnum* set forth in the writ is only $1,000. *Ibid.*

A bond to dissolve a mechanic's lien given before January 1, 1916, under R. L. c. 197, § 28, as amended by St. 1906, c. 223, and St. 1909, c. 237, which is not recorded in the registry of deeds within ten days after its approval and which therefore is not good as a statutory bond, if executed under seal and delivered and accepted, is good at common law, and the obligee in an action upon it can recover the amount of his unpaid debt. *Chertok* v. *Morang*, 598.

In an action on such a bond it was said that it was not necessary to determine, whether a municipal court in which the proceedings to enforce the mechanic's lien were brought had jurisdiction to make an order dissolving the lien upon the filing of such a common law bond, because the obligee of the bond, after having recovered in his action upon it the full amount of his debt, would not be permitted to enforce his mechanic's lien. *Ibid.*

MEMORANDUM.

See appropriate subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL.

MISTAKE.

Suit in equity to correct mistake in instrument in writing, see appropriate subtitle under EQUITY JURISDICTION.

MORTGAGE.

Of Real Estate.

Under St. 1912, c. 271, § 1, if an original contract of conditional sale of heating apparatus signed by the purchaser and not by the seller is made within the required time in the clerk's office of the city in which the real estate is situated, this is constructive notice of the contract, and gives the seller as against the mortgagee of the real estate the right to remove such heating apparatus, if unpaid for. *Nickels* v. *Scholl*, 205.

Under the statute quoted above, the recording within the required time by the city clerk of such a contract of conditional sale is none the less constructive notice of the instrument to a mortgagee of the house because the city clerk by mistake omitted to index the record of the contract in the name of the purchaser of the plumbing materials and inserted in the index only the name of their seller. *Ibid.*

Upon subsidiary facts found by a master in a suit in equity involving the validity of contracts of conditional sale for heating apparatus and plumbing materials placed in a house afterwards mortgaged, it was held that a finding by the master that the heating apparatus and the plumbing materials were personal property was warranted. *Ibid.*

Publication of a notice of a sale in foreclosure of a mortgage of real estate was held to satisfy the requirements of R. L. c. 187, § 14, where it was in a newspaper published in the town which is the county seat of the county in which the land lies, although the land did not lie in that town and there was a newspaper which purported to be published in a part of the town where the land lay, if such latter newspaper was in fact published in another town in another county. *Brown* v. *Learmouth*, 417.

Of Personal Property.

In a suit in equity to obtain the discharge of a mortgage upon personal property, where it appears that the mortgage was given to secure the mortgagee for his liability as indorser upon certain promissory notes for $1,400 and that these notes have been paid in full, it is no defence that the mortgage was made for an unnecessarily large sum and was given by the plaintiff for the purpose of deceiving and defrauding his creditors, which fraud was participated in by all the parties to the mortgage. *Murphy* v. *Moore*, 565.

MOTOR VEHICLE.

Registration.

One, who is in possession of a motor car as the purchaser under a contract of conditional sale by which the title to the car is to pass to him upon the payment of the final instalment of the purchase money and who has committed no breach of the contract, has a special property in the car which makes him its "owner" for the purposes of registration within the meaning of St. 1909, c. 534, § 2, as amended by St. 1912, c. 400. *Hurnanen* v. *Nickea*, 346.

Rights of Driver as Traveller upon Highway.

Conduct of a motorman operating a street railway car in failing to comply with a rule of the street railway corporation, which makes it his duty to shut off the brilliant headlight of his car and to apply the brakes and to put on the reverse, was held under the circumstances to be evidence of negligence in actions for personal injuries sustained in a collision with a motor car resulting from such conduct. *Bailey* v. *Worcester Consolidated Street Railway*, 477.

Negligent Operation.

Cases involving questions of negligent operation of motor vehicles, see appropriate subtitle under NEGLIGENCE.

Rights of Guest in Motor Car.

One who is travelling *gratis* in a motor car in company with its owner by such owner's invitation and is injured by reason of the negligence of the chauffeur operating the car, who is acting at the time as the servant of the owner, cannot maintain an action against such owner for his injuries unless he can show gross negligence on the part of the chauffeur. West *v.* Poor, 196 Mass. 183, approved. *Massaletti* v. *Fitzroy*, 487.

Insurance.

In a suit in equity under St. 1914, c. 464, to reach and apply the money recoverable under a policy of casualty insurance to the satisfaction of a judgment obtained by the plaintiff against the insured for injuries sustained by being hit by an automobile of the insured, it was held that the evidence warranted a finding that at the time of the plaintiff's injury the automobile was "driven or manipulated," within the meaning of those words in the policy, by the insured and not by his son who was less than sixteen years of age and just previously had been driving, so that the defendant was not freed from liability under a provision of the policy which applied if the automobile was being driven by one under sixteen years of age. *Williams* v. *Nelson*, 191.

Liability of Partnership for Negligence of One Partner.

Where, at the trial of an action against two partners for personal injuries sustained by the plaintiff from being run into when he was riding a bicycle on a highway by a motor truck belonging to the partnership and negligently driven by one of the defendants, there was evidence on the question, whether one of the partners who in the absence of his partner was driving the truck was using it solely for pleasure driving, it was held that rulings, that there was no evidence that at the time of the accident the partner driving the truck was acting within the scope of the partnership business and that there was no evidence that the partner driving the truck was acting as the agent of the other defendant properly were refused. *Teague* v. *Martin*, 458.

If two partners own as partnership property a motor truck used in the partnership business, and one of the partners gives the other permission to use the truck for pleasure trips, and if, while the partner to whom this permission is given is using the truck on a pleasure drive not on account of the business of the firm, he negligently runs down a traveller who is riding a bicycle on a highway, the absent partner, who lent his share in the motor truck to his co-partner for pleasure purposes, is not liable to the injured traveller, because the loan for the outside purpose did not create an agency. *Teague* v. *Martin*, 458.

MUNICIPAL CORPORATIONS.

Officers and Agents.

Provision of St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, as to the finality of the decision of the trial judge on a petition of a person holding an office classified under the civil service rules of the Commonwealth to the police, district or municipal court within the judicial district where such person resides for review of the action of an officer or board in removing the petitioner, means that the justice's findings of fact shall be final and binding on the parties. *Commissioner of Public Works of Boston* v. *Justice of Municipal Court of Dorchester*, 12.

Such provision however does not leave the parties without remedy if there are essential errors of law apparent on the record of the proceedings depriving such a party of substantial rights, and a person so aggrieved may maintain a petition for a writ of certiorari to quash such erroneous proceedings. *Ibid.*

On the findings of the trial judge who heard petitions for writs of certiorari brought by the commissioner of public works of the city of Boston against a justice of the Municipal Court of the Dorchester District of that city to quash orders made by that judge upon such reviews, reversing orders made by the petitioner abolishing the office of supervisor of permits of the public works department and the offices of divisional engineer and superintendent of main drainage of the sewer and water service of the public works department, it was held that the decision of the judge that the orders of removal were made without proper cause and in bad faith showed no error of law and was not reviewable on a writ of certiorari. *Ibid.*

Failure of a city or town clerk, when he records an original contract of conditional sale of heating apparatus and plumbing materials presented for record under St. 1912, c. 271, § 1, to index the record under the name of the purchaser, does not make it any less constructive notice to a mortgagee of the real estate. *Nickels* v. *Scholl*, 205.

Under the provisions contained in St. 1915, c. 267, Part III, § 7; Part I, § 4, an ordinance of the city of Cambridge, which was in force when that city adopted the Plan B form of government, fixing the salary of the mayor under the former charter at $3,500 a year, is in conflict with the power given to the city council by the new charter and does not impair the validity of an ordinance, passed by such city council four months after the adoption of the new charter, fixing the salary of the mayor under that charter at $5,000 a year. *Mayor of Cambridge* v. *Cambridge*, 249.

Where a city hires from a master teamster horses, a cart and a driver to

carry material from one place to another as the officers or servants of the city may direct, the driver being left to deal with the horses in his own way, the driver is not in the employ of the city within the meaning of St. 1913, c. 807, § 6. *Clancy's Case*, 316.

Mayor.

Under the provisions contained in St. 1915, c. 267, Part III, § 7; Part I, § 4, an ordinance of the city of Cambridge, which was in force when that city adopted the Plan B form of government, fixing the salary of the mayor under the former charter at $3,500 a year, is in conflict with the power given to the city council by the new charter and does not impair the validity of an ordinance, passed by such city council four months after the adoption of the new charter, fixing the salary of the mayor under that charter at 5,000 a year. *Mayor of Cambridge* v. *Cambridge*, 249.

Fire Department.

Member of the fire department of a city, who was driving a motor car of the department carrying the chief to a fire, was held not to be an employee or agent of the chief, who therefore was not liable for his negligence. *Skerry* v. *Rich*, 462.

Clerk.

Failure of a city or town clerk, when he records an original contract of conditional sale of heating apparatus and plumbing materials presented for record under St. 1912, c. 271, § 1, to index the record under the name of the purchaser, does not make it any less constructive notice to a mortgagee of the real estate. *Nickels* v. *Scholl*, 205.

Plan B Form of Government.

Under the provisions contained in St. 1915, c. 267, Part III, § 7; Part I, § 4, an ordinance of the city of Cambridge, which was in force when that city adopted the Plan B form of government, fixing the salary of the mayor under the former charter at $3,500 a year, is in conflict with the power given to the city council by the new charter and does not impair the validity of an ordinance, passed by such city council four months after the adoption of the new charter, fixing the salary of the mayor under that charter at $5,000 a year. *Mayor of Cambridge* v. *Cambridge*, 249.

Unlawful Use of Highway for Public Purpose.

In a suit in equity it was found by a master that two streets, the fee to which was in the plaintiff, never had been laid out as public ways and never had become such ways by dedication or prescription and that the use of them by the public was permissive, and it appeared that the town in which they lay, against which the suit was brought, with knowledge of the plaintiff's claim of ownership and against his protest had constructed sewers through these streets without authority to do so, and it was held that the plaintiff was not required to accept indemnity in money damages and was entitled to relief by injunction. *Brown* v. *Peabody*, 52.

In the same suit it appeared that the abuttors on the two streets generally had made connections with the sewers constructed by the defendant and that sewer assessments had been laid by the defendant and had been paid by the abuttors, and it was held that, in view of these facts, the defendant should be allowed a reasonable time within which it might acquire by proper legal proceedings the right to lay and maintain its sewers in the two private streets, if it should choose to do so. *Brown* v. *Peabody*, 52.

Accordingly a decree was entered awarding an injunction and commanding the defendant to remove the sewers within five months unless previously the defendant should have acquired the legal right to their maintenance, the court in the meantime retaining the bill for the assessment of damages already suffered. *Ibid.*

In the case above described it was found by a master that the plaintiff was damaged in the sum of $250 by reason of the acts of the defendant, which sum included all past and future damages that might accrue to him, and it was held that the maintenance of the sewers in the plaintiff's land was a substantial continuing trespass, for which an assessment of past and future damages could not be made rightfully without the plaintiff's consent. *Ibid.*

Defects in Ways.

Liability of municipalities for defects in highways, see appropriate subtitle under WAY.

MUNICIPAL COURT.

See POLICE, DISTRICT AND MUNICIPAL COURTS; MUNICIPAL COURT OF THE CITY OF BOSTON.

MUNICIPAL COURT OF THE CITY OF BOSTON.

Under the circumstances, a trustee in an action brought by trustee process in the Municipal Court of the City of Boston, was held to have no right of appeal to the Superior Court from a judgment against him upon scire facias issued upon an original judgment affirmed on report of the Apellate Division. *Universal Optical Corp.* v. *Globe Optical Co.* 84.

A finding by a judge of the Municipal Court of the City of Boston, reported to the Appellate Division, that there was a default in the payment of the principal and interest of a certain mortgage, cannot be said as matter of law to have been unwarranted, where all the evidence is not reported. *Brown* v. *Learmouth*, 417.

Motion for a new trial in the Municipal Court of the City of Boston was held to have been addressed to the discretion of the trial judge, so that there was no ground for questioning the proper exercise of that discretion on a report to the Appellate Division. *Ibid.*

Under Rule 37 of the Municipal Court of the City of Boston, which requires that "Requests for rulings in the trial of causes shall be in writing and presented to the court before the closing arguments unless special leave is given to present further requests later," it is for the trial judge to determine whether the rule has been complied with, and where his decision on this matter has been affirmed by the Appellate Division, it is not open to question in this court. *Ibid.*

Whether the judge's action in reporting his denial of the motion for a new trial gave the Appellate Division jurisdiction of the question, was not decided. *Brown* v. *Learmouth*, 417.

NAME.

Upon a petition for a writ of mandamus a finding of a single justice, warranted by the evidence presented before him, that the surname of a candidate for Governor always has been spelled "McCall" and never has been spelled "MacCall," that the name of the candidate is "McCall" and not "MacCall" and that under St. 1913, c. 835, § 259, "the name of Frederick W. Mansfield should precede that of Samuel McCall in the arrangement of names in alphabetical order upon the official ballot of candidates for Governor," is a finding of fact which is not open to revision by this court. *Mansfield* v. *Secretary of the Commonwealth*, 262.

NEGLIGENCE.

Degrees of Negligence.

Discussion by LORING, J., of degrees of negligence. *Massaletti* v. *Fitzroy*, 487.

The rule stated in Gill *v.* Middelton, 105 Mass. 477, 480, that "The law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility," is repudiated and overruled. *Ibid.*

Justice requires that to make out liability in case of a gratuitous undertaking the plaintiff must prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. By LORING, J. *Ibid.*

Plaintiff's Due Care: Contributory Negligence.

Of a workman injured by the explosion of a charge of dynamite left unexploded in blasting. *Cogliano* v. *Ferguson*, 147.

Of employee of tenant in a building in descending unlighted stairway. *Maran* v. *Peabody*, 432.

Exception by the defendant to the admission of testimony of the plaintiff at the trial of an action for personal injuries, received at a place of amusement maintained by the defendant when the plaintiff slipped upon a sheet of metal on the floor, explanatory of why she did not have a firm hold of a rail, was overruled because the evidence was competent as bearing upon the plaintiff's due care, and its admission could not have harmed the defendant, as it did not appear that the plaintiff's injury resulted in any degree from the nature of her grasp upon the support. *Ferry* v. *Eastern Consolidated Amusement Co.* 259.

Conduct of the driver and owner of a motor car in driving on a highway between eight and nine o'clock in the evening, in violation of the law of the road, from behind on the right of a carriage, when he is run into by a street railway car, was held under the circumstances not as matter of law to over-

come the presumption of his due care created by St. 1914, c. 553. *Bailey* v. *Worcester Consolidated Street Railway*, 477.

Due Care of Person in Charge of Child.

Upon the evidence at the trial of an action against a railroad corporation under St. 1906, c. 463, Part I, § 63, for causing the death of the plaintiff's intestate, a child two years and five months of age, when she was travelling alone over a grade crossing before the enactment of St. 1914, c. 553, it was held that, the intestate being incapable of exercising care, the administrator must prove, in order to recover under the statute, the exercise of due care on the part of her custodian and that a girl of seven, to whose charge the intestate had been confided, could not have been found to have exercised any care of her whatever, so that a verdict should have been ordered for the defendant. *Marchant* v. *Boston & Maine Railroad*, 472.

Imputed.

In actions by guests in a motor car at the time of a collision with a street railway car, it appeared that the plaintiffs did all that reasonably could be expected from invited guests in the way of looking out for their safety, and, the jury having found that the operator of the motor car was in the exercise of due care, it was said that no question arose as to whether, if the owner had been found to have been negligent, his negligence could have been imputed to the other plaintiffs. *Bailey* v. *Worcester Consolidated Street Railway*, 477.

Invited Person.

In an action against a dealer who occupied a store with a basement beneath it where packages of goods delivered in the course of business were received, by one who, to deliver a barrel entered the cellar when no one was around and fell into a hole, it was held that under the circumstances the plaintiff could not recover because he was not invited to enter the cellar, the fact that he found the door open which before he had found locked being no evidence of an implied invitation to enter. *Scanlon* v. *United Cigar Stores Co.* 481.

In the same case it was said that, even if it should be assumed that there was an implied invitation to enter the cellar to deliver the barrel, there was no invitation to go about in the darkened cellar in search of a receiving clerk or to pass through the cellar as a short cut to the store above. *Ibid.*

One who is travelling *gratis* in a motor car in company with its owner by such owner's invitation and is injured by reason of the negligence of the chauffeur operating the car, who is acting at the time as the servant of the owner, cannot maintain an action against such owner for his injuries unless he can show gross negligence on the part of the chauffeur. West *v.* Poor, 196 Mass. 183, approved. *Massaletti* v. *Fitzroy*, 487.

Ground of decision in Davis *v.* Central Congregational Society, 129 Mass. 367, discussed by LORING, J. *Ibid.*

Toward one Transported Gratuitously.

The measure of liability of one who undertakes to carry a person *gratis* is the same as that of one who undertakes to keep goods *gratis*. By LORING, J. *Massaletti* v. *Fitzroy*, 487.

One who is travelling *gratis* in a motor car in company with its owner by such owner's invitation and is injured by reason of the negligence of the chauffeur operating the car, who is acting at the time as the servant of the owner, cannot maintain an action against such owner for his injuries unless he can show gross negligence on the part of the chauffeur. West *v.* Poor, 196 Mass. 183, approved. *Ibid.*

Employer's Liability.

Effect of workmen's compensation act.

The provisions of St. 1911, c. 751, Part I, § 1, doing away with certain defences in actions for personal injuries sustained by employees in the course of their employment, have no application to personal injuries received by an employee outside this Commonwealth. *Cogliano* v. *Ferguson*, 147.

Assumption of risk.

In an action for personal injuries sustained in the State of Maine while in the employ of the defendant by reason of the explosion of a charge of dynamite that had been left unexploded in blasting, it was held that, if under the circumstances the plaintiff was ignorant of any danger arising from an unexploded charge of dynamite, he did not assume the risk of such a hidden danger, and that, being ignorant of the danger, he could not have been lacking in due care in failing to avoid it. *Cogliano* v. *Ferguson*, 147.

Notice under statute.

In an action by an employee of a telephone company against his employer for personal injuries alleged to have been caused by negligence of a superintendent, it was held that the notice of the time, place and cause of the injury given by the plaintiff under St. 1909, c. 514, § 132, as amended by St. 1911, c. 178, sufficiently stated the cause of the accident without specifying that the direct cause of the plaintiff's injury was the negligence of the defendant's superintendent. *Whalen* v. *New England Telephone & Telegraph Co.* 361.

In the same case it was held that, even if the notice had been insufficient in stating the cause of the injury, it was plain on the record "that there was no intention to mislead, and that the employer was not in fact misled thereby," the defendant through its superintendent having been in possession of all the facts. *Ibid.*

Superintendence.

Order of a superintendent of a telephone company to one of his workmen to go upon a pole which supported also the wires of an electric light company, when, contrary to his assurances, the electric light wires were charged with a dangerous voltage of electricity, and the workman received a shock of electricity which caused him to fall to the ground, was held to be a negli-

gent one and given by the superintendent within the scope of his authority. *Whalen* v. *New England Telephone & Telegraph Co.* 361.

Dangerous occupation.

In an action against a street railway corporation, not a subscriber under the workmen's compensation act, by a workman employed by the defendant to pull out ashes from under the boilers in its power house, load them into a wheelbarrow or truck and empty them into an ash pit usually partly filled with water, for injury to one of the plaintiff's eyes from the hot ashes splashing up with steam and heat after the plaintiff had tipped a load of ashes into the pit, it was held that there was no evidence of negligence on the part of the defendant. *Mammott* v. *Worcester Consolidated Street Railway*, 282.

In the same case, on all the evidence, it was held that it could not have been found that the failure to cool the ashes with water was negligence of the defendant directly causing the plaintiff's injury. *Ibid.*

In an action for personal injuries sustained in the State of Maine while in the employ of the defendant by reason of the explosion of a charge of dynamite that had been left unexploded in blasting, it was held that, if under the circumstances the plaintiff was ignorant of any danger arising from an unexploded charge of dynamite, he did not assume the risk of such a hidden danger, and that, being ignorant of the danger, he could not have been lacking in due care in failing to avoid it. *Cogliano* v. *Ferguson*, 147.

In the same case it was said that, if an employer conducting work in which blasting is necessary chooses to put the blasting in charge of one man and to make another man the boss of every part of the work except the blasting, there is no necessary presumption as matter of law that the general boss knows the peculiar and concealed dangers incident to blasting. *Ibid.*

In the same case it was said that the defendant personally took part in directing the work frequently enough to be held responsible for the method of its conduct, and that, if it was necessary for the safety of the workmen that there should be a rigid system compelling an inspection after the firing of each blast, and there was no inspection, the defendant might have been found negligent in failing to provide inspection. *Ibid.*

In the same case it was held that the defendant might have been found wanting in the performance of his duty to furnish a place free from hidden and unknown dangers in putting an employee, even a boss, at work on a ledge where such a secret peril might be lurking after every large blast without giving him warning in this regard. *Ibid.*

Failure to inspect.

Action for personal injuries to an employee due to an explosion caused by a failure to inspect in blasting operations. *Cogliano* v. *Ferguson*, 147.

Street Railway.

Person on highway.

Upon the evidence at the trial of an action against a street railway corporation for personal injuries caused by stumbling over paving blocks in a city street where the defendant was relaying its tracks, it was held that the use

or scattering of paving blocks over which the plaintiff testified that she tripped and fell was wholly under the supervision and control of the city and that the defendant was not liable. *Connors* v. *Worcester Consolidated Street Railway*, 357.

A motorman operating a street railway car, in passing through a city street that obviously is "broken up" in the process of repaving while the tracks of the street railway are being relaid, is not bound to anticipate that a traveller on foot will pass round a barrier of paving blocks and, stumbling and falling over scattered paving blocks placed there by the city, will be precipitated upon the track in front of the car or will come in contact with the car in falling. *Ibid.*

Conduct of a motorman operating a street railway car in failing to comply with a rule of the street railway corporation, which makes it his duty to shut off the brilliant headlight of his car, and to apply the brakes and to put on the reverse, was held under the circumstances to be evidence of negligence in actions for personal injuries sustained in a collision with a motor car resulting from such conduct. *Bailey* v. *Worcester Consolidated Street Railway*, 477.

Passenger.

Testimony at the trial of an action against a corporation operating a street railway for personal injuries received by the plaintiff, who, while he was standing in the aisle of a car of the defendant with his hand in a strap, was thrown when the car "came to a very sudden stop with a terrible jerk," which was held to furnish evidence for the jury of negligence on the part of the defendant in the operation of the car. *Danofsky* v. *Boston Elevated Railway*, 97.

Other testimony at the trial of the same case which was held to warrant a finding that the sudden stopping of the car was caused by the negligence of the motorman. *Ibid.*

In an action by a woman against a street railway corporation for personal injuries sustained in alighting from a car of the defendant in which the plaintiff was a passenger, where the plaintiff testifies that as she was alighting from the car the heels of both her shoes came off, having got caught in the step of the car, but there is nothing to show either the character or the condition of the step, there is no evidence of negligence for submission to the jury. *Kerr* v. *Worcester Consolidated Street Railway*, 281.

Railroad.

Person crossing tracks.

Upon the evidence at the trial of an action against a railroad corporation under St. 1906, c. 463, Part I, § 63, for causing the death of the plaintiff's intestate, a child two years and five months of age, when she was travelling alone over a grade crossing before the enactment of St. 1914, c. 553, it was held that, the intestate being incapable of exercising care, the administrator must prove, in order to recover under the statute, the exercise of due care on the part of her custodian, and that a girl of seven, to whose charge the intestate had been confided, could not have been found to have exercised any care of her whatever, so that a verdict should have been ordered for the defendant. *Marchant* v. *Boston & Maine Railroad*, 472.

Passenger.

At the trial of an action against a railroad corporation for personal injuries from being pushed from the step of a car in a train of the defendant that was backing before starting from a station, when the plaintiff was leaving the train after having gone upon it to see off friends who were taking the train, where there was no evidence connecting any other employee of the defendant than the station master with the accident, it was held to have been harmful error for the judge, against the objection of the defendant, to leave it to the jury to say, whether the station master in question "or any other employee of the defendant" pushed the plaintiff and caused him to fall from the car. *Krasnicki* v. *Boston & Maine Railroad*, 354.

Motor Vehicle.

At the trial of an action for personal injuries caused by the collision of the plaintiff's bicycle with the defendant's motor truck, a witness for the plaintiff was allowed without objection to testify that he had seen the defendant's truck go up this same road at other times and, on cross-examination, the defendant, subject to the plaintiff's exception, was allowed to ask the witness "What kind of a turn" the defendant's truck "customarily" made in going round the corner in question. The plaintiff's exception was sustained because the question in regard to the manner of turning the corner was not opened by the plaintiff, so that the rule as to the discretionary power to allow an immaterial issue to be met after being opened did not apply. *Luiz* v. *Falvey*, 253.

In the same case it was held that the plaintiff was harmed by the admission of the incompetent evidence in regard to the defendant's customary way of turning the corner, because, if the jury had believed the plaintiff's testimony that the defendant swerved to the left, they could find that the defendant was violating St. 1910, c. 605, § 5. *Ibid.*

And the fact that two of the plaintiff's own witnesses had testified that after the accident the defendant's truck was on the right hand side of the road about fifty feet before reaching the corner in question, which in that respect was in conflict with the testimony of the plaintiff himself, did not make the error harmless. *Ibid.*

Evidence, in an action against the owner of a motor car by one who was struck by the locking ring of a tire which came off when the tire blew out, which was held to warrant submission to the jury of the question whether the plaintiff's injuries were caused by the negligence of the defendant's servant. *Regan* v. *Cummings*, 414.

In actions by guests in a motor car at the time of a collision with a street railway car, it appeared that the plaintiffs did all that reasonably could be expected from invited guests in the way of looking out for their safety, and, the jury having found that the operator of the motor car was in the exercise of due care, it was said that no question arose as to whether, if the owner had been found to have been negligent, his negligence could have been imputed to other plaintiffs. *Bailey* v. *Worcester Consolidated Street Railway*, 477.

Conduct of the driver and owner of a motor car in driving on a highway between eight and nine o'clock in the evening, in violation of the law of the

road, from behind on the right of a carriage, where he is run into by a street railway car, was held under the circumstances not as matter of law to overcome the presumption of his due care created by St. 1914, c. 553. *Bailey* v. *Worcester Consolidated Street Railway*, 477.

In Use of Highway.

Upon the evidence at the trial of an action against a street railway corporation for personal injuries caused by stumbling over paving blocks in a city street where the defendant was relaying its tracks, it was held that the use or scattering of paving blocks over which the plaintiff testified that she tripped and fell was wholly under the supervision and control of the city and that the defendant was not liable. *Connors* v. *Worcester Consolidated Street Railway*, 357.

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Conduct of a motorman operating a street railway car in failing to comply with a rule of the street railway corporation, which makes it his duty to shut off the brilliant headlight of his car, and to apply the brakes and to put on the reverse, was held under the circumstances to be evidence of negligence in actions for personal injuries sustained in a collision with a motor car resulting from such conduct. *Ibid.*

Obstruction of Highway for Lawful Purpose.

If a railroad corporation maintaining an overhead steel bridge above and across a highway has a right to use in a proper manner a swinging staging under the bridge for the purpose of painting the bridge, such right must be exercised with due regard to the public safety and the convenience of travellers. *Hurley* v. *Boston & Maine Railroad*, 365.

The railroad corporation must use such a staging as will not unnecessarily obstruct the way and will not be likely to frighten horses; it must not maintain the staging for more than a reasonable time and, while the staging is over the highway, the corporation must use due care to prevent injury

to travellers and to provide warning signals during periods of darkness. *Hurley* v. *Boston & Maine Railroad*, 365.

In an action against a railroad corporation for damage to the plaintiff's horse, wagon and harness, by reason of the horse being frightened after sundown by a swinging staging maintained by the defendant without lights under an overhead bridge crossing above the highway, it is a question of fact for the jury whether the temporary obstruction of the public way by the defendant was a reasonable one or whether the staging was an unreasonable structure or was maintained negligently. *Ibid.*

Of One Controlling Real Estate.

In an action by a tinsmith and roofer against the owner of a building who employed the plaintiff to repair the roof of the building for injuries caused by the breaking of a ladder, it was held that it was for the jury to determine whether the defendant performed his duty of furnishing the plaintiff with a reasonably safe ladder to reach his place of work and whether by the exercise of reasonable diligence the defendant could have ascertained the defective condition of the ladder. *Windt* v. *Poli*, 329.

In an action by a salesgirl, whose employer occupied a part of the first and second floors of a city building, against the owner of the building for injuries sustained when attempting to descend an insufficiently lighted marble staircase, it was held that there was evidence of her due care to be submitted to the jury. *Maran* v. *Peabody*, 432.

Evidence at the trial of the action above described was held to warrant a finding that, in order to render this stairway reasonably safe for the plaintiff's use at the time of the accident, the defendant should have provided artificial light and that he failed to perform that duty. *Ibid.*

In the same case it was held, as to a certain covenant in the lease of the defendant to the plaintiff's employer, that, whatever might be the respective rights of the landlord and the tenant under this covenant, it did not deprive the plaintiff of her remedy against the owner of the building, whose negligence caused her injury. *Ibid.*

In an action against a dealer who occupied a store with a basement beneath it where packages of goods delivered in the course of business were received, by one who to deliver a barrel entered the cellar when no one was around and fell, it was held that under the circumstances the plaintiff could not recover because he was not invited to enter the cellar, the fact that he found the door open which before he had found locked being no evidence of an implied invitation to enter. *Scanlon* v. *United Cigar Stores Co.* 481.

In Use of Electricity.

Order of a superintendent of a telephone company to one of his workmen to go upon a pole which supported also the wires of an electric light company, when, contrary to his assurances, the electric light wires were charged with a dangerous voltage of electricity and the workman received a shock of electricity which caused him to fall to the ground, was held to be a negligent one and given by the superintendent within the scope of his authority. *Whalen* v. *New England Telephone & Telegraph Co.* 361.

In Use of Explosives.

In an action for personal injuries sustained in the State of Maine while in the employ of the defendant by reason of the explosion of a charge of dynamite that had been left unexploded in blasting, it was held that, if under the circumstances the plaintiff was ignorant of any danger arising from an unexploded charge of dynamite, he did not assume the risk of such a hidden danger, and that, being ignorant of the danger, he could not have been lacking in due care in failing to avoid it. *Cogliano* v. *Ferguson*, 147.

In the same case it was said that the defendant personally took part in directing the work frequently enough to be held responsible for the method of its conduct, and that, if it was necessary for the safety of the workmen that there should be a rigid system compelling an inspection after the firing of each blast, and there was no inspection, the defendant might have been found negligent in failing to provide inspection. *Ibid.*

In the same case it was held that the defendant might have been found wanting in the performance of his duty to furnish a place free from hidden and unknown dangers in putting an employee, even a boss, at work on a ledge where such a secret peril might be lurking after every large blast without giving him warning in this regard. *Ibid.*

In the same case it was said that, if an employer conducting work in which blasting is necessary chooses to put the blasting in charge of one man and to make another man the boss of every part of the work except the blasting, there is no necessary presumption as matter of law that the general boss knows the peculiar and concealed dangers incident to blasting. *Ibid.*

In Disposal of Ashes.

In an action against a street railway corporation, not a subscriber under the workmen's compensation act, by a workman employed by the defendant to pull out ashes from under the boilers in the power house, load them into a wheelbarrow or truck and empty them into an ash pit usually partly filled with water, for injury to one of the plaintiff's eyes from the hot ashes splashing up with steam and heat after the plaintiff had tipped a load of ashes into the pit, it was held that there was no evidence of negligence on the part of the defendant. *Mammott* v. *Worcester Consolidated Street Railway*, 282.

In the same case, on all the evidence, it was held that it could not be found that the failure to cool the ashes with water was negligence of the defendant directly causing the plaintiff's injury. *Ibid.*

In Disposal of Rubbish.

In an action by the owner of a pasture adjoining a railroad location against the railroad corporation for the alleged poisoning of heifers belonging to the plaintiff, circumstantial evidence was held to have been insufficient to warrant a finding that arsenate of lead in certain kegs, assumed to have done the poisoning, was placed in the pasture by any negligence or wrongful act for which the defendant was responsible. *Gardner* v. *New York, New Haven, & Hartford Railroad*, 545.

In Maintenance of Place of Amusement.

Exception by the defendant to the admission of testimony of the plaintiff at the trial of an action for personal injuries, received at a place of amusement maintained by the defendant when the plaintiff slipped upon a sheet of metal on the floor, explanatory of why she did not have a firm hold of a rail, was overruled because the evidence was competent as bearing upon the plaintiff's due care, and its admission could not have harmed the defendant, as it did not appear that the plaintiff's injury resulted in any degree from the nature of her grasp upon the support. *Ferry* v. *Eastern Consolidated Amusement Co.* 259.

Frightening Horses.

Action against a railroad corporation for damages resulting from the plaintiff's horse being frightened by a swinging staging hung under a bridge over a highway for use of persons painting the bridge. *Hurley* v. *Boston & Maine Railroad*, 365.

Defective Ladder.

In an action by a tinsmith and roofer against the owner of a building who employed the plaintiff to repair the roof of the building for injuries caused by the breaking of a ladder, it was held that it was for the jury to determine whether the defendant performed his duty of furnishing the plaintiff with a reasonably safe ladder to reach his place of work and whether by the exercise of reasonable diligence the defendant could have ascertained the defective condition of the ladder. *Windt* v. *Poli*, 329.

Of Plaintiff in Action of Contract.

In an action by a fraternal beneficiary corporation against a savings bank for the amount of deposits drawn out by the plaintiff's treasurer upon forged orders, remissness of the plaintiff's auditors, in failing to discover that the treasurer was misappropriating the funds of the corporation or was obtaining money from the savings bank on forged orders, was held not to require a finding that the corporation was so negligent in failing to discover the fraud as to lose its right to recover the amount paid by the bank on the forged orders. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

Causing Death.

Upon the evidence at the trial of an action against a railroad corporation under St. 1906, c. 463, Part I, § 63, for causing the death of the plaintiff's intestate, a child two years and five months of age, when she was travelling alone over a grade crossing before the enactment of St. 1914, c. 553, it was held that, the intestate being incapable of exercising care, the administrator must prove, in order to recover under the statute, the exercise of due care on the part of her custodian and that a girl of seven, to whose charge the intestate had been confided, could not have been found to have exercised any care of her whatever, so that a verdict should have been ordered for the defendant. *Marchant* v. *Boston & Maine Railroad*, 472.

Gross.

One who is travelling *gratis* in a motor car in company with its owner by such owner's invitation and is injured by reason of the negligence of the chauffeur operating the car, who is acting at the time as the servant of the owner, cannot maintain an action against such owner for his injuries unless he can show gross negligence on the part of the chauffeur. West v. Poor, 196 Mass. 183, approved. *Massaletti* v. *Fitzroy*, 487.

Proximate Cause.

Where one has been guilty of a negligent act which he knew was likely to cause harm to some person, he or his employer is none the less liable for an injury caused by the negligent act because he could not have foreseen the precise thing that happened. *Regan* v. *Cummings*, 414.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

Under St. 1912, c. 271, § 1, if an original contract of conditional sale of heating apparatus signed by the purchaser and not by the seller is made within the required time in the clerk's office of the city in which the real estate is situated, this is constructive notice of the contract, and gives the seller as against the mortgagee of the real estate the right to remove such heating apparatus, if unpaid for. *Nickels* v. *Scholl*, 205.

Under the statute quoted above, the recording within the required time by the city clerk of such a contract of conditional sale is none the less constructive notice of the instrument to a mortgagee of the house because the city clerk by mistake omitted to index the record of the contract in the name of the purchaser of the plumbing materials and inserted in the index only the name of their seller. *Ibid.*

In an action by an employee of a telephone company against his employer for personal injuries alleged to have been caused by negligence of a superintendent, it was held that the notice of the time, place and cause of the injury given by the plaintiff under St. 1909, c. 514, § 132, as amended by St. 1911, c. 178, sufficiently stated the cause of the accident without specifying that the direct cause of the plaintiff's injury was the negligence of the defendant's superintendent. *Whalen* v. *New England Telephone & Telegraph Co.* 361.

In the same case it was held that, even if the notice had been insufficient in stating the cause of the injury, it was plain on the record "that there was no intention to mislead, and that the employer was not in fact misled thereby," the defendant through its superintendent having been in possession of all the facts. *Ibid.*

Under the provision of R. L. c. 178, § 28, which provides that an officer who has served an execution shall post the notices of the execution sale "in a public place," a statement contained in the return of such an officer that

he posted the notice of the sale "in one place in the City of Salem, to wit, at the registry of deeds," shows a compliance with the statute without the use of the word "public" before the word "place." *Cunningham* v. *Bright*, 385.

Upon the question, whether under St. 1911, c. 212, § 1, and Superior Court Rules 52 and 28, the defendant in an action at law had given notice to the plaintiff of the filing of exceptions, it was held that findings of a judge of the Superior Court that a letter purporting to be a notice was addressed to the plaintiff's attorney at Brockton where he had no office and not at his true address in Boston, and that he received no notice, must stand. *Murch* v. *Clapp*, 569.

Of sale in foreclosure of a mortgage of real estate. *Brown* v. *Learmouth*, 417.

Of defect in highway, see appropriate subtitle under WAY, *Public*.

NUISANCE.

A fence, which has stood for thirty years, made of iron pickets about two feet high standing upon a stone curbing thirteen inches high, the front face of the curbing adjoining a public sidewalk and the nearest part of the iron fence being two inches back from the face of the curbing, cannot be found to constitute a nuisance. *Noyes* v. *Carr*, 339.

OFFICER.

The validity of an attachment of real estate is not impaired by the fact that the attaching officer in his return made a description of the property by metes and bounds and called the proceeding a "special attachment." *Cunningham* v. *Bright*, 385.

Under the provision of R. L. c. 178, § 28, which provides that an officer who has served an execution shall post the notices of the execution sale "in a public place," a statement contained in the return of such an officer that he posted the notice of the sale "in one place in the City of Salem, to wit, at the registry of deeds," shows a compliance with the statute without the use of the word "public" before the word "place." *Ibid.*

PUBLIC OFFICER, see that title.

PARTNERSHIP.

It was not determined whether a New York bond purporting to be of a partnership and signed by one partner in behalf of the firm, was binding under the law of this Commonwealth, the bond having been delivered in the city of New York where the persons concerned carried on business, so that it was to be assumed that the liability of the surety was to be determined by the law of New York. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

If two partners own as partnership property a motor truck used in the partnership business, and one of the partners gives the other permission to use the truck for pleasure trips, and if, while the partner to whom this permission is given is using the truck on a pleasure drive not on account of the

business of the firm, he negligently runs down a traveller who is riding a bicycle on a highway, the absent partner, who lent his share in the motor truck to his copartner for pleasure purposes, is not liable to the injured traveller, because the loan for the outside purpose did not create an agency. *Teague* v. *Martin*, 458.

Where, at the trial of an action against two partners for personal injuries sustained by the plaintiff from being run into when he was riding a bicycle on a highway by a motor truck belonging to the partnership and negligently driven by one of the defendants, there was evidence on the question, whether one of the partners who in the absence of his partner was driving the truck was using it solely for pleasure driving, it was held that rulings, that there was no evidence that at the time of the accident the partner driving the truck was acting within the scope of the partnership business and that there was no evidence that the partner driving the truck was acting as the agent of the other defendant, properly were refused. *Ibid.*

PASSENGER.

Actions for damages and for personal injuries suffered by passengers, see appropriate subtitles under NEGLIGENCE.

PATENT.

No rights exist under a patent until it has been granted. *Aronson* v. *Orlov*, 1.

Previous to the issuance of a patent, no case can arise under the patent laws respecting the relative rights of the parties to or under a patent, such that the exclusive jurisdiction of the case would be in the United States courts. *Ibid.*

Although, in a certain suit to enjoin unlawful interference with the business of the plaintiffs by two former employees and a third person, there were allegations by both the plaintiffs and the defendants of rights under assignments of applications for patents, it was held that the State court had jurisdiction of the suit, both because it did not appear that any patent had been granted and because the gravamen of the suit was the malicious and wrongful interference with the plaintiffs' business and not an infringement of rights under a patent or an application therefor. *Ibid.*

PERMITTING BUILDING TO BE USED FOR PROSTITUTION.

At the trial of a complaint under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, for permitting a building under the defendant's control to be used for prostitution, assignation and lewdness, where the complaint contains only one count and charges no other offence, it is error for the presiding judge to instruct the jury that, if the defendant let the building knowing at the time she let it that the tenant was to use the premises for the purposes prohibited by the statute, they could find the defendant guilty. *Commonwealth* v. *LaPointe*, 266.

Letting a building for the purposes of prostitution, assignation and lewdness is a separate and different crime defined in the same section of the statute. *Ibid.*

At the trial of a complaint under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, for permitting a building under the defendant's control to be used for prostitution, assignation and lewdness, where evidence has been introduced tending to show the control of the defendant over the house in question, two internal revenue receipts for taxes paid for the sale of intoxicating liquors issued to the defendant and found enclosed in envelopes in a desk in the house in question properly may be admitted in evidence as tending to corroborate the evidence in regard to the defendant's control over the house. *Commonwealth* v. *LaPointe*, 226.

PERSONAL PROPERTY.

Real or Personal Property, see that title.

PHYSICIANS AND SURGEONS.

The provision of the workmen's compensation act in St. 1911, c. 751, Part III, § 13, as amended by St. 1914, c. 708, § 12, that the charges of physicians "for services under this act shall be subject to the approval of the Industrial Accident Board," refers only to the services for which under St. 1911, c. 751, Part II, § 5, the insurer is liable, and a physician's bill for services rendered more than two weeks after the injury, for which the employee is liable and the insurer is not, does not require the approval of the Industrial Accident Board, although the services were rendered in treating the employee for the consequences of the injury for which he was awarded compensation under the act. *Holland* v. *Zeuner*, 142.

Where a manufacturer, who was a subscriber under the workmen's compensation act, had posted notices in his factory giving the name and location of a hospital where "medical and hospital attendance" would be furnished for injured employees, and an injured employee, when urged to go to the designated hospital, replied that he "did not want to bother," and afterwards was attended by a physician of his own choosing, under St. 1911, c. 751, Part II, § 5, as amended by St. 1914, c. 708, § 1, the insurer is not liable to the physician for any part of his services. *Davidson's Case*, 257.

On the evidence in an action brought by a physician against the executor of the will of a married woman for his services up to the time of her death, it was held that it could be found that the defendant's testatrix intended the plaintiff to understand that her estate should be bound to pay his charges if they were not paid before her death, and that this would be equivalent to a promise to pay the debt after her death, on which the plaintiff could recover. *Charron* v. *Day*, 305.

PLEADING, CIVIL.

Declaration.

Where the declaration in an action of contract contains only a count on an account annexed for work done and materials furnished, the plaintiff cannot recover for a breach of a covenant in a deed without amending his declaration by substituting or adding a count for breach of the covenant. *New York Central & Hudson River Railroad* v. *Clarke*, 274.

Declaration in Set-off.

In an action of contract no set-off can be allowed to the defendant where he has filed no declaration in set-off. *Taylor* v. *Kennedy*, 390.

In an action by a fraternal beneficiary corporation against a savings bank for money paid out by the defendant on forged orders of the plaintiff's treasurer, the defendant relied, as an equitable defence, upon allegations that a part only of the money so paid out by the defendant was used by the fraudulent treasurer for his own purposes, the remainder being deposited in another bank to the plaintiff's credit and used for its purposes, and, the plaintiff not demurring to the equitable defence on the ground that the remedy at law was plain and adequate, it was said that it was unnecessary to consider whether the defendant could have recovered under a declaration in set-off for money had and received. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

Specifications.

Testimony of the plaintiff in an action for personal injuries against a street railway company, caused by his being thrown down by a street car being stopped suddenly, which was held not to constitute a variance from specifications filed by him, containing a statement that the plaintiff's hold was broken and he was thrown down by the passengers who were thrown off their feet by the sudden stopping of the car. *Danofsky* v. *Boston Elevated Railway*, 97.

In an action for personal injuries, it was said that, under the view of the evidence taken by this court, it was not necessary to consider the defendant's contention that a statement contained in a specification stands in all respects and for all purposes as if it were a part of the declaration. *Ibid.*

Plea in Abatement.

Where a suit in equity had been amended into an action at law, it was held that, although the proper practice for the plaintiff would have been to join issue on a plea in abatement to the jurisdiction of the court contained in the defendant's answer in the action at law, the fact that the plaintiff, instead of doing this, resorted to the procedure of moving to strike out from the defendant's answer a portion adjudicated against the defendant in the suit in equity, which motion was allowed by the judge, did not injuriously affect the substantial rights of the defendant and under St. 1913, c. 716, § 1, gave it no right of exception. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

Answer.

In an action on a promissory note the defence of fraud in the making of the note is not open to the defendant unless it is set up in the answer. *Whitman* v. *Fournier*, 93.

Defence of estoppel, not set up in the answer, could not be relied on at the trial. *Day* v. *Old Colony Trust Co.* 225.

Under a statement, in a report of a case by the presiding judge, that "At the trial the allegations and facts set forth in the answer of the defendant were

admitted to be true," the plaintiff is not bound by a mere conclusion of law alleged in the answer. *Day* v. *Old Colony Trust Co.* 225.

In an action of contract, where the plaintiff has admitted at the trial that "the allegations and facts set forth in the answer of the defendant" are true, and the answer contains a statement which may be either a conclusion of law or a statement of fact and which, if it is a statement of fact, is of doubtful meaning and the decision of the case depends upon its meaning, the presiding judge should not order a verdict for the defendant, but should leave to the jury the question of fact that is doubtful upon the statement in the answer, if, as in the present case, there is evidence for the plaintiff upon that issue. *Ibid.*

In an action on a covenant in a lease to pay rent it was said that, if a certain averment in the answer was to be treated as a pleading in recoupment, the defendant, while denying that the covenant to pay rent was in force against him, could not rely on alleged breaches by his lessor of covenants in the same lease as a ground for damages. *Taylor* v. *Kennedy*, 390.

A surety on a promissory note cannot, without alleging it in his answer, set up the defence that he was discharged from his liability as surety, at least to the extent that he was injured thereby, by an arrangement made by the payee with the maker without the consent or knowledge of the surety, whereby collateral security was surrendered. *Durfee* v. *Kelly*, 571.

The question whether the defendant, after a verdict has been ordered and has been entered for the plaintiff in an action by a surety against a co-surety for contribution, should be allowed to amend his answer by setting up the defence of a discharge from his liability as surety by reason of a surrender of security by the payee, was wholly within the discretion of the presiding judge, and his refusal to allow such an amendment was final. *Ibid.*

Equitable Defence.

In an action by a fraternal beneficiary corporation against a savings bank for money paid out by the defendant on forged orders of the plaintiff's treasurer, the defendant relied, as an equitable defence, upon allegations that a part only of the money so paid out by the defendant was used by the fraudulent treasurer for his own purposes, the remainder being deposited in another bank to the plaintiff's credit and used for its purposes, and, the plaintiff not demurring to the equitable defence on the ground that the remedy at law was plain and adequate, it was said that it was unnecessary to consider whether the defendant could have recovered under a declaration in set-off for money had and received. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

Amendment.

See that subtitle under PRACTICE, CIVIL.

Variance.

Testimony of the plaintiff in an action for personal injuries against a street railway company, caused by his being thrown down by a street car being

stopped suddenly, which was held not to constitute a variance from specifications filed by him, containing a statement that the plaintiff's hold was broken and he was thrown down by the passengers who were thrown off their feet by the sudden stopping of the car. *Danofsky* v. *Boston Elevated Railway*, 97.

PLEADING, CRIMINAL.

Complaint or Indictment.

A formal defect in a complaint cannot be taken advantage of by a motion in arrest of judgment. *Commonwealth* v. *Galatta*, 308.

Under the rules of criminal pleading, contained in R. L. c. 218, §§ 17, 37, a complaint under St. 1904, c. 305, for wantonly destroying personal property of another need not allege that the destruction was in a manner and by a means not particularly described or mentioned in R. L. c. 208. *Ibid.*

On a complaint under R. L. c. 100, § 1, charging that the defendant "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same," the defendant can be convicted on proof of keeping with intent to sell unlawfully without any evidence of exposing liquors for sale. *Commonwealth* v. *Ahern*, 547.

Motion to Quash.

A motion in the Superior Court to quash for a defect in form a complaint that originally was filed in an inferior court is made too late. *Commonwealth* v. *Galatta*, 308.

Motion in Arrest of Judgment.

Formal defect in a complaint cannot be taken advantage of by a motion in arrest of judgment. *Commonwealth* v. *Galatta*, 308.

POLICE, DISTRICT AND MUNICIPAL COURTS.

Provision of St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, as to the finality of the decision of the trial judge on a petition of a person holding an office classified under the civil service rules of the Commonwealth to the police, district or municipal court within the judicial district where such person resides for review of the action of an officer or board in removing the petitioner, means that the justice's findings of fact shall be final and binding on the parties. *Commissioner of Public Works of Boston* v. *Justice of Municipal Court of Dorchester*, 12.

Such provision however does not leave the parties without remedy if there are essential errors of law apparent on the record of the proceedings depriving such a party of substantial rights, and a person so aggrieved may maintain a petition for a writ of certiorari to quash such erroneous proceedings. *Ibid.*

It is settled that the jurisdiction of a district court, so far as it depends on the amount to be recovered, is to be decided by the *ad damnum* in the writ. *Massasoit-Pocasset National Bank* v. *Borden*, 581.

An action on a bond for $4,000 given to dissolve a mechanic's lien may be brought in a district court whose jurisdiction is limited to claims of $1,000 if the *ad damnum* set forth in the writ is only $1,000. *Massasoit-Pocasset National Bank* v. *Borden*, 581.

In the action above described it was said that there is no statute nor any principle of public policy that requires an inferior court with a pecuniary limit to its jurisdiction, upon proof of the breach of a bond on which an action is brought, to enter judgment for the full penalty of the bond in excess of the *ad damnum* of the writ which is all that the plaintiff asks for. *Ibid.*

POWER.

An appointment of property made by the donee of a testamentary power to a creditor of such donee for the purpose of discharging the obligation of a guaranty in writing, where the estate of the donee has been represented insolvent and commissioners have been appointed under R. L. c. 142, § 2, gives the appointee no priority over the other creditors of the donee's estate. *Vinton* v. *Pratt*, 468.

PRACTICE, CIVIL.

Objection to Jurisdiction.

In an election petition brought under St. 1914, c. 783, § 10, charging a violation of the provisions of the corrupt practices act a plea in abatement, setting up a defence that the subpoena had been made returnable in fifteen days instead of fourteen days after the filing of the petition, was held to be within the jurisdiction of the Superior Court and not to be open upon a petition for a writ of prohibition, filed a few days after the plea. *Ashley* v. *Three Justices of Superior Court*, 63.

Defendant was held not entitled to set up in an action at law which previously had been a suit in equity a plea in abatement that the court had no jurisdiction of the case because of lack of service upon the defendant, a foreign corporation, where it appeared that that question had been decided for the plaintiff while the suit was in equity. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

Service of Process.

Where a foreign corporation actually doing business in this Commonwealth has been brought within the jurisdiction of a court of this Commonwealth by the service under St. 1913, c. 257, of a writ upon its agent, who is a resident of this Commonwealth, voluntarily appointed by it to have charge of its business here, it becomes answerable in this jurisdiction to any transitory cause of action, including an action at law on promissory notes made and negotiated by it in another State. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

Amendment.

Of petition under corrupt practices act. *Ashley* v. *Three Justices of Superior Court*, 63.

Where the declaration in an action of contract contains only a count on an account annexed for work done and materials furnished, the plaintiff cannot

recover for a breach of a covenant in a deed without amending his declaration by substituting or adding a count for breach of the covenant. *New York Central & Hudson River Railroad* v. *Clarke*, 274.

In an action of contract where the presiding judge ordered a verdict for the defendant, and the verdict was ordered rightly upon the pleadings, and it did not appear that the judge did not order the verdict for the defendant upon the pleadings, but it appeared that by amending its declaration the plaintiff would have a right to go to a jury, upon exceptions alleged by the plaintiff, it was ordered that the plaintiff should have leave to amend its declaration and that, if such an amendment should be filed in the Superior Court within a required time, the case should stand for trial; and that otherwise the exceptions should be overruled. *Ibid.*

In an action by a lessor on a covenant in a lease to pay rent, brought after the lessor had sold and conveyed the leased premises, the plaintiff when the case came on for argument before this court asked leave to amend his declaration under St. 1913, c. 716, § 3, by substituting as plaintiff the grantee of the leased premises. It appeared that the grantee had made a new lease of the premises for sixteen years, subject to the lease sued upon, which he had assigned to his lessee, who had entered upon the premisses and had occupied them ever since, and it was held that, it never having been determined whether the grantee could maintain the action, the plaintiff must be left to take such further proceedings as he chose to take in the trial court, and accordingly the motion to amend was denied. *Taylor* v. *Kennedy*, 390.

The determination of the question whether the defendant, after a verdict has been ordered and has been entered for the plaintiff in an action by a surety against a co-surety for contribution, should be allowed to amend his answer by setting up the defence of a discharge from his liability as surety by reason of a surrender of security by the payee, was held to be wholly within the discretion of the presiding judge, and his refusal to allow such an amendment was final. *Durfee* v. *Kelly*, 571.

Where a suit in equity against a foreign corporation, which was begun by the insertion of the bill in a common law writ, is amended into an action at law, it remains the same proceeding, and a decision of this court, made in the suit in equity before the amendment, is the law of the case. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

In the same case it was said that the plaintiff, by filing a replication to the plea to the jurisdiction of the court in the suit in equity before the amendment into an action at law, did not waive his right to object to the reopening in the action at law of the issues disposed of in the suit in equity before the amendment. *Ibid.*

Equitable Defence.

In an action by a fraternal beneficiary corporation against a savings bank which had paid out the plaintiff's money on forged orders of its treasurer, the defendant relied, as an equitable defence under R. L. c. 173, § 28, on the facts that the plaintiff's dishonest treasurer, who drew $3,345 on forged orders out of the savings bank, used for himself only $250 and that the remaining $3,095 was deposited in another bank in the plaintiff's name and was used in paying sick benefits and other legal obligations of the plaintiff, and a

finding of the judge that the plaintiff could recover only $250 was held to be right. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

Admission of Truth of Facts Alleged in Pleadings.

Under a statement, in a report of a case by the presiding judge, that "At the trial the allegations and facts set forth in the answer of the defendant were admitted to be true," the plaintiff is not bound by a mere conclusion of law alleged in the answer. *Day* v. *Old Colony Trust Co.* 225.

In an action of contract, where the plaintiff has admitted at the trial that "the allegations and facts set forth in the answer of the defendant" are true, and the answer contains a statement which may be either a conclusion of law or a statement of fact and which, if it is a statement of fact, is of doubtful meaning and the decision of the case depends upon its meaning, the presiding judge should not order a verdict for the defendant, but should leave to the jury the question of fact that is doubtful upon the statement in the answer, if, as in the present case, there is evidence for the plaintiff upon that issue. *Ibid.*

Law of the Case.

In an action at law, which was begun as a suit in equity, it was said that the plaintiff, by filing a replication to the plea to the jurisdiction of the court in the suit in equity before the amendment into an action at law, did not waive his right to object to the reopening in the action at law of the issues disposed of in the suit in equity before the amendment. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

Where a suit in equity against a foreign corporation, which was begun by the insertion of the bill in a common law writ, is amended into an action at law, it remains the same proceeding, and a decision of this court, made in the suit in equity before the amendment, that the defendant was engaged in business as well as soliciting business in this Commonwealth and under St. 1913, c. 257, properly was served with process in the manner provided for service in actions against domestic corporations, is the law of the case, and the defendant cannot be allowed to set up in abatement of the action at law the alleged defence that the court has no jurisdiction for want of proper service on the defendant. *Ibid.*

Rules of Court.

Rule 28 of the Superior Court. *Murch* v. *Clapp*, 569.

Rule 52 of the Superior Court. *Murch* v. *Clapp*, 569.

Rule 37 of the Municipal Court of the City of Boston. *Brown* v. *Learmouth*, 417.

Interrogatories.

In an action upon a promissory note where the genuineness of an endorsement is in issue and where the defendant read to the jury the plaintiff's answers to interrogatories propounded to him by the defendant, in which the plaintiff answered, "There is no indorsement by [the payee] to me. The note in question was indorsed [by the payee] in blank before maturity and for

value paid [by a certain firm who] assigned the same to me," it was held that a verdict should not have been ordered for the plaintiff because the defendant had not precluded himself from arguing to the jury that the answer was not true. *Whitman* v. *Fournier*, 93.

Auditor's Report.

At the trial of an action where the evidence consisted of an auditor's report and of oral testimony, it was held that the judge properly refused to make certain rulings which dealt only with the evidence contained in the auditor's report. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

Hearing by Judge without Jury.

A judge before whom a case is tried without a jury properly may refuse to make a ruling correct in law if it is not applicable to the facts of the case as found by him on evidence warranting such findings. *Willard* v. *Greenwood*, 549.

If a judge, before whom an action at law has been tried without a jury and who has been asked to make certain rulings of law, takes the case under advisement and does not deal with the requests for rulings until some time later when he files a memorandum of decision with a finding against the party who made the requests, there is no error of law in this if the party whose requests for rulings have been refused is allowed to except to the refusal. *Ibid.*

Finding by Judge.

A finding of a judge of the Municipal Court of the City of Boston, reported to the Appellate Division, that there was a default in the payment of the principal and interest of a certain mortgage, cannot be said as matter of law to have been unwarranted, where all the evidence is not reported. *Brown* v. *Learmouth*, 417.

Whether Question is for Judge or Jury.

In an action of contract, where the plaintiff has admitted at the trial that "the allegations and facts set forth in the answer of the defendant" are true, and the answer contains a statement which may be either a conclusion of law or a statement of fact and which, if it is a statement of fact, is of doubtful meaning and the decision of the case depends upon its meaning, the presiding judge should not order a verdict for the defendant, but should leave to the jury the question of fact that is doubtful upon the statement in the answer, if, as in the present case, there is evidence for the plaintiff upon that issue. *Day* v. *Old Colony Trust Co.* 225.

At a trial where a declaration of a deceased person is offered in evidence under R. L. c. 175, § 66, it is right for the presiding judge to refuse to leave to the jury the preliminary questions determining whether the evidence is to be received, the statute making it the duty of the judge to decide those questions, leaving to the jury, if the evidence is admitted, its credibility and the weight to be attached to it. *McSweeney* v. *Edison Electric Illuminating Co.* 563.

Conduct of Trial.

Determination of questions preliminary to admission of evidence.

At a trial where a declaration of a deceased person is offered in evidence under R. L. c. 175, § 66, it is right for the presiding judge to refuse to leave to the jury the preliminary questions determining whether the evidence is to be received, the statute making it the duty of the judge to decide those questions, leaving to the jury, if the evidence is admitted, its credibility and the weight to be attached to it. *McSweeney* v. *Edison Electric Illuminating Co.* 563.

Qualification of expert witness.

As to action of a judge presiding at the trial of an action upon a bond of indemnity delivered in the State of New York, in permitting associate counsel for the plaintiff to testify as an expert witness as to the law of New York although he knew that law only by investigation and study, never having practised in that State, it was held with some hesitation under the circumstances of the trial that it could not be said that the determination by the judge of the preliminary question of the qualification of the expert was clearly wrong and that therefore it must stand. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

Discretionary power of judge as to certain classes of evidence.

At the trial of an action of tort for personal injuries, where the plaintiff and the defendant both have testified as witnesses, it is within the discretionary power of the presiding judge to allow the plaintiff and the defendant each to be asked how many children and how much of a family he has in order to enable the jury to learn in a general way "what sort of a man is on the witness stand." *Luiz* v. *Falvey*, 253.

At the trial of an action for personal injuries caused by the collision of the plaintiff's bicycle with the defendant's motor truck a witness for the plaintiff was allowed without objection to testify that he had seen the defendant's truck go up this same road at other times and, on cross-examination, the defendant, subject to the plaintiff's exception, was allowed to ask the witness "What kind of a turn" the defendant's truck "customarily" made in going round the corner in question. The plaintiff's exception was sustained because the question in regard to the manner of turning the corner was not opened by the plaintiff, so that the rule as to the discretionary power to allow an immaterial issue to be met after being opened did not apply. *Ibid.*

Requests, rulings and instructions.

An exception to a refusal to give instructions, not applicable to any issue at the trial of issues framed in an appeal from a decree of the Probate Court, must be overruled. *Holbrook* v. *Seagrave*, 26.

A request for an instruction to a jury involving three or more independent subjects properly may be refused for that reason. *Ibid.*

No exception lies to a refusal to give as an instruction to a jury a ruling requested which is argumentative in form and relates only to a part of the evidence upon the subject of which it treats. *Ibid.*

At the trial of jury issues involving the validity of a will, there was evidence

tending to show that the chief beneficiary under the will was a sister of the testatrix and that her husband was a physician and attended the testatrix at a hospital to which she had been taken by him and that the testatrix died at the hospital nineteen days after the will was executed, and it was held that the contestants were entitled to have the jury instructed that the law views with jealousy relations of this nature between a physician and his patient, especially where the patient is enfeebled by disease. *Holbrook* v. *Seagrave*, 26.

Under Rule 37 of the Municipal Court of the City of Boston, which requires that "Requests for rulings in the trial of causes shall be in writing and presented to the court before the closing arguments unless special leave is given to present further requests later," it is for the trial judge to determine whether the rule has been complied with, and where his decision on this matter has been affirmed by the Appellate Division, it is not open to question in this court. *Brown* v. *Learmonth*, 417.

At the trial of an action where the evidence consisted of an auditor's report and of oral testimony, it was held that the judge properly refused to make certain rulings which dealt only with the evidence contained in the auditor's report. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

Conflicting evidence upon an issue in regard to the cause of the decay of the timbers and planking of a chartered tugboat was held properly to have been left to the jury with careful instructions. *Ibid.*

Requests for rulings which were held rightly to have been refused in an action by a workman for damages resulting from unlawful interference with his employment by one who claimed to have an assignment of his wages. *Doucette* v. *Sallinger*, 444.

A judge before whom a case was tried without a jury properly may refuse to make a ruling correct in law if it is not applicable to the facts of the case as found by him on evidence warranting such findings. *Willard* v. *Greenwood*, 549.

If a judge, before whom an action at law has been tried without a jury and who has been asked to make certain rulings of law, takes the case under advisement and does not deal with the requests for rulings until some time later when he files a memorandum of decision with a finding against the party who made the requests, there is no error of law in this if the party whose requests for rulings have been refused is allowed to except to the refusal. *Ibid.*

Judge's charge.

At the trial of an action against a railroad corporation for personal injuries from being pushed from the step of a car in a train of the defendant that was backing before starting from a station, when the plaintiff was leaving the train after having gone upon it to see off friends who were taking the train, where there was no evidence connecting any other employee of the defendant than the station master with the accident, it was held to have been harmful error for the judge, against the objection of the defendant, to leave it to the jury to say whether the station master in question "or any other employee of the defendant" pushed the plaintiff and caused him to fall from the car. *Krasnicki* v. *Boston & Maine Railroad*, 354.

Charge of the trial judge was held to have been proper in an action by a

workman for damages resulting from unlawful interference with his employment by one who claimed to have an assignment of his wages. *Doucette* v. *Sallinger*, 444.

Ordering of Verdict.

In an action of contract, where the plaintiff has admitted at the trial that "the allegations and facts set forth in the answer of the defendant" are true, and the answer contains a statement which may be either a conclusion of law or a statement of fact and which, if it is a statement of fact, is of doubtful meaning and the decision of the case depends upon its meaning, the presiding judge should not order a verdict for the defendant, but should leave to the jury the question of fact that is doubtful upon the statement in the answer, if, as in the present case, there is evidence for the plaintiff upon that issue. *Day* v. *Old Colony Trust Co.* 225.

Where, at the trial of an action on a policy of life insurance, the defence relied upon was that the insured, among other false representations in his application for the policy falsely represented that he never had cancer or tumor and was then in good health, and the judge ordered a verdict for the defendant, it was held that, the burden being on the defendant to show that the misstatements of the insured were made in bad faith or that their falsity increased the risk, the question of fact should have been submitted to the jury. *McDonough* v. *Metropolitan Life Ins. Co.* 450.

In the same case it was said that, even if the presiding judge felt that the evidence establishing the fact that the insured had the disease was so overwhelming that a verdict disregarding it ought not to be permitted to stand, it was wrong to order a verdict for the defendant. *Ibid.*

Memorandum.

If a judge, before whom an action at law has been tried without a jury and who has been asked to make certain rulings of law, takes the case under advisement and does not deal with the requests for rulings until some time later when he files a memorandum of decision with a finding against the party who made the requests, there is no error of law in this if the party whose requests for rulings have been refused is allowed to except to the refusal. *Willard* v. *Greenwood*, 549.

New Trial.

Motion for a new trial in the Municipal Court of the City of Boston was held to have been addressed to the discretion of the trial judge, so that there was no ground for questioning the proper exercise of that discretion on a report to the Appellate Division. *Brown* v. *Learmouth*, 417.

On an exception by the petitioner, a corporation, at the trial of a petition for the assessment of damages resulting from the abolition of a grade crossing of a highway with a railroad, to a failure of the trial judge properly to instruct the jury to disregard certain portions of returns made by the petitioner to the Secretary of the Commonwealth and the Tax Commissioner before August 1, 1903, it was said that it was not necessary to decide whether under St. 1913, c. 716, § 1, the error mentioned above would have been sufficient to require a new trial, as a substantial error was committed in admitting other evidence. *Union Glass Co.* v. *Somerville*, 202.

Exceptions.

Bill.

Where, after a jury has retired and the justice who presided at the trial has gone to his home, the jury return and ask for further instructions which the Chief Justice of the court, who was not present at the trial, gives to them subject to exceptions of one of the parties, such exceptions cannot be considered by this court on a bill of exceptions allowed by the justice who presided at the trial; but must be presented by a bill allowed by the Chief Justice. *Holbrook* v. *Seagrave*, 26.

Notice of filing.

Upon the question whether under St. 1911, c. 212, § 1, and Superior Court Rules 52 and 28, the defendant in an action at law had given notice to the plaintiff of the filing of exceptions, it was held that findings of a judge of the Superior Court that a letter purporting to be a notice was addressed to the plaintiff's attorney at Brockton where he had no office and not at his true address in Boston, and that he received no notice, must stand. *Murch* v. *Clapp*, 569.

When exception lies.

It was assumed, but without so deciding, that an appeal to a judge of the Superior Court from an order of a building inspector under St. 1913, c. 655, § 55, applying for an order forbidding the enforcement of the order of the inspector is a "civil cause" within the meaning of R. L. c. 173, § 106, so that it may be brought before this court upon exceptions alleged in the Superior Court under that statute. *Stevens, landowner*, 368.

The preliminary decision of a presiding judge admitting in evidence a statement of a deceased person offered under R. L. c. 175, § 66, is not conclusive and, where all the evidence material to the question of the admission of the statement is contained in a bill of exceptions, the action of the judge may be reviewed by this court and can be held to be wrong because unsupported by any evidence. *Hasey* v. *Boston*, 516.

An exception to a refusal to give instructions not applicable to any issue, at the trial of issues framed in an appeal from a decree of the Probate Court, must be overruled. *Holbrook* v. *Seagrave*, 26.

Construction of bill; scope of exception.

The appellants at the trial, which occupied four days, of jury issues on an appeal from a decree of the Probate Court allowing a will, excepted to the exclusion of certain evidence in the nature of declarations by the testatrix, which was offered to show affection or dislike of the testatrix for certain relations and her interest in her church and in a charitable corporation, but their bill of exceptions did not purport to contain all the material evidence at the trial and it was held that the exceptions must be overruled. *Holbrook* v. *Seagrave*, 26.

In an action where the defendant excepted to the admission in evidence of certain letters, it was held that, the defendant not having asked the judge to restrict the effect of the letters, his general exception could not be sustained, as they were admissible for a limited purpose. *Leavitt* v. *Maynes*, 350.

Whether error was harmful.

On an exception by the petitioner, a corporation, in a petition for the assessment of damages resulting from the abolition of a grade crossing of a highway with a railroad, to a failure of the trial judge properly to instruct the jury to disregard certain portions of returns made by the petitioner to the Secretary of the Commonwealth and the Tax Commissioner before August 1, 1903, it was said that it was not necessary to decide whether under St. 1913, c. 716, § 1, the error mentioned above would have been sufficient to require a new trial, as a substantial error was committed in admitting other evidence. *Union Glass Co.* v. *Somerville*, 202.

At the trial of an action against the owner of a motor vehicle for personal injuries received by one riding a bicycle, it was held that under the circumstances the plaintiff was harmed by the admission of the incompetent evidence in regard to the defendant's customary way of turning the corner, because, if the jury had believed the plaintiff's testimony that the defendant swerved to the left, they could find that the defendant was violating St. 1910, c. 605, § 5. *Luiz* v. *Falvey*, 253.

And the fact that two of the plaintiff's own witnesses had testified that after the accident the defendant's truck was on the right hand side of the road about fifty feet before reaching the corner in question, which in that respect was in conflict with the testimony of the plaintiff himself, did not make the error harmless. *Ibid.*

Exception by the defendant to the admission of testimony of the plaintiff at the trial of an action for personal injuries, received at a place of amusement maintained by the defendant when the plaintiff slipped upon a sheet of metal on the floor, explanatory of why she did not have a firm hold of a rail, was overruled because the evidence was competent as bearing upon the plaintiff's due care, and its admission could not have harmed the defendant, as it did not appear that the plaintiff's injury resulted in any degree from the nature of her grasp upon the support. *Ferry* v. *Eastern Consolidated Amusement Co.* 259.

Testimony by a physician as to the comparative health of a husband and wife previous to their being killed when in a limousine which was run into by a railway train, where the issue was whether the wife survived the husband, was held, even if immaterial, not to be harmful to the excepting party. *Robson* v. *Lyford*, 318.

At the trial of issues relating to the sanity of a testatrix, certain testimony of an attorney at law of the testatrix relating to a conversation between himself and the husband was held to have had no bearing upon the question of the soundness of mind of the deceased wife and to have been immaterial, so that its admission was harmless error under St. 1913, c. 716, § 1, and that it therefore afforded no ground for sustaining an exception. *Panell* v. *Rosa*, 594.

Report.

Under a statement, in a report of a case by the presiding judge, that "At the trial the allegations and facts set forth in the answer of the defendant were admitted to be true," the plaintiff is not bound by a mere conclusion of law alleged in the answer. *Day* v. *Old Colony Trust Co.* 225.

Upon a report by a single justice who heard a petition for a writ of man-

damus, which is a proceeding at law, this court has no jurisdiction to change or reverse a decision as to the facts made by the single justice who heard the case unless the finding of fact is not warranted by the evidence. *Mansfield* v. *Secretary of the Commonwealth*, 262.

Under the provision added to R. L. c. 173, § 105, by St. 1917, c. 345, that "A justice of the Supreme Judicial Court or of the Superior Court may, upon request of the parties, in any case where there is agreement as to all the material facts, report the case to the full court for determination without making any decision," in making such a report in a case where material facts are omitted from the statement of agreed facts that might be inferred from the facts stated it is the duty of a judge of the Superior Court to draw and report all the material inferences of fact. *Atlantic Maritime Co.* v. *Gloucester*, 519.

Upon such a report of a petition against the city of Gloucester under St. 1909, c. 490, Part I, § 77, appealing from the refusal of the assessors of that city to abate a tax upon fishing vessels belonging to the petitioner, the reservation was discharged and the case was remanded to the Superior Court for further hearing, because the judge of that court had omitted to perform the duty of making a finding of fact as to the *situs* for taxation purposes of the vessels of the petitioner. *Ibid.*

Appeal.

A record, which discloses only an appeal from an order denying, after a hearing, a petition to vacate a judgment, is barren of any suggestion of a question of law, and the appeal is frivolous. *Rose* v. *Harrison*, 261.

Costs.

The omission of St. 1852, c. 312, § 9, re-enacted in substance in Gen. Sts. c. 129, § 9, and in Pub. Sts. c. 167, § 9, from R. L. c. 173, § 11, was held to have been intentional, so that where a writ served by trustee process seasonably was returned to court but the plaintiff neglected to enter it and the trustee did not appear, such trustee cannot maintain a complaint for costs against the plaintiff who sued out the writ. *Whiting* v. *Houghton*, 429.

Where two persons are sued in separate actions for the same cause of action and a judgment for the full amount of damages with costs is entered against each of them, if one of them pays the judgment in full, this discharges the other from his liability for the damages but he still is liable for the costs awarded against him. *Ryan* v. *Annelin*, 591.

Under the authority given to a trial judge by R. L. c. 203, § 9, where two cases are tried together, to "reduce the witness fees and other costs," if the two cases are against different persons and each for the same cause of action and a recovery is had against each of the defendants, although the judge may order that only one set of costs shall be recovered provided that appears to be just, he is not obliged to make such an order, and, after a separate judgment for the full amount of damages with costs has been entered against each defendant, it is not possible to make such a readjustment. *Ibid.*

Variance.

Testimony of the plaintiff in an action for personal injuries against a street railway company, caused by his being thrown down by a street car being stopped suddenly, which was held not to constitute a variance from specifications filed by him containing a statement that the plaintiff's hold was broken and he was thrown down by the passengers who were thrown off their feet by the sudden stopping of the car. *Danofsky* v. *Boston Elevated Railway*, 97.

Certiorari.

See that title.

Trial by Jury of Issues from Probate Court on Appeal.

See appropriate subtitle under PROBATE COURT.

Proceedings under Corrupt Practices Act.

See appropriate subtitle under ELECTIONS.

Petition for Review of Removal of one Classified under Civil Service.

Provision of St. 1911, c. 624, § 1, as amended by St. 1915, c. 251, as to the finality of the decision of the trial judge on a petition of a person holding an office classified under the civil service rules of the Commonwealth to the police, district or municipal court within the judicial district where such person resides for review of the action of an officer or board in removing the petitioner, means that the justice's findings of fact shall be final and binding on the parties. *Commissioner of Public Works of Boston* v. *Justice of Municipal Court of Dorchester*, 12.

Such provision however does not leave the parties without remedy if there are essential errors of law apparent on the record of the proceedings depriving such a party of substantial rights, and a person so aggrieved may maintain a petition for a writ of certiorari to quash such erroneous proceedings. *Ibid.*

On the findings of the trial judge who heard petitions for writs of certiorari brought by the commissioner of public works of the city of Boston against a justice of the Municipal Court of the Dorchester District of that city to quash orders made by that judge upon such reviews, reversing orders made by the petitioner abolishing the office of supervisor of permits of the public works department and the offices of divisional engineer and superintendent of main drainage of the sewer and water service of the public works department, it was held that the decision of the judge that the orders of removal were made without proper cause and in bad faith showed no error of law and was not reviewable on a writ of certiorari. *Ibid.*

Procedure under Workmen's Compensation Act.

See appropriate subtitle under WORKMEN'S COMPENSATION ACT.

Disbarment Proceedings.

See appropriate subtitle under ATTORNEY AT LAW.

Practice in Municipal Court of the City of Boston.

Practice peculiar to the MUNICIPAL COURT OF THE CITY OF BOSTON, see that title.

PRACTICE, CRIMINAL.

Motion to Quash.

A motion in the Superior Court to quash for a defect in form a complaint that originally was filed in an inferior court is made too late. *Commonwealth* v. *Galatta*, 308.

Conduct of Trial.

Order of evidence.

In a criminal trial, as in a civil one, the order of evidence is within the discretionary power of the presiding judge, who in the exercise of such discretion, after the defendant has introduced some evidence, may permit the district attorney to reopen his case and introduce further evidence in support of the indictment. *Commonwealth* v. *Coyne*, 269.

Requests, rulings and instruction.

At the trial of a complaint under R. L. c. 101, § 11, as amended by St. 1914, c. 624, § 14, for permitting a building under the defendant's control to be used for prostitution, assignation and lewdness, where the complaint contains only one count and charges no other offence, it is error for the presiding judge to instruct the jury that, if the defendant let the building knowing at the time she let it that the tenant was to use the premises for the purposes prohibited by the statute, they could find the defendant guilty. *Commonwealth* v. *LaPointe*, 266.

Arrest of Judgment.

A formal defect in a complaint cannot be taken advantage of by a motion in arrest of judgment. *Commonwealth* v. *Galatta*, 308.

PREFERENCE.

See appropriate subtitle under BANKRUPTCY.

PROBATE COURT.

Jurisdiction.

The court has no jurisdiction under R. L. c. 148, § 15, to authorize an executor to adjust by compromise a controversy concerning a will by an agreement to which trustees to whom property is devised and bequeathed by the will are not parties. *Ellis* v. *Hunt*, 39.

Accounts.

A conservator, after the death of his ward, has a right to retain the possession or custody of the property of the ward in his hands until his account has

been passed upon by the Probate Court. *Day* v. *Old Colony Trust Co.* 225.

Until the amounts due to him for services and expenses have been determined by that court, he may hold possession of the property against the executor of the will of his deceased ward. *Ibid.*

On an appeal from a decree of the Probate Court allowing with certain modifications the accounts of a conservator of the property of a deceased ward, the allowance of which was opposed by the executor of the will of the ward, it was held that the single justice who heard the appeal was right in refusing as matter of law to allow charges of the conservator for services of counsel rendered and expenses incurred after the decree of the Probate Court was made. *Day* v. *Nichols*, 236.

In the same case it was said that the conservator must seek relief by the presentation of a supplemental account in the Probate Court. *Ibid.*

In the same case it was held that such charges could not be allowed as costs and expenses under R. L. c. 162, § 44, because under the circumstances of the case the account allowed was not a final account nor in the nature of a final account. *Ibid.*

Upon cross appeals taken by an executor and by the conservator of the property of the testatrix from a decree of the Probate Court allowing with certain modifications the account of the conservator, the question of taxable costs rests wholly in the discretion of the single justice who hears the appeals. *Ibid.*

Sale of Real Estate.

On an appeal from a decree of the Probate Court, where the question was not open under the objections filed, it was said that it was unnecessary to consider whether the appealing party was a creditor of a certain deceased person and, if he was, whether such a creditor, after the estate of the deceased person had been represented insolvent, was a person aggrieved within the meaning of R. L. c. 162, § 9, by a decree of the Probate Court granting a license to sell real estate of the deceased for the payment of debts. *Murray* v. *Fiorentini*, 466.

Appeal.

Under R. L. c. 162, § 23, the authority of the Supreme Judicial Court upon an appeal from the Probate Court is limited necessarily to the issues heard and determined in the Probate Court, and the statute cannot be construed to confer on the Supreme Judicial Court jurisdiction to determine matters not necessarily involved in the determination of the issues before the Probate Court. *Day* v. *Nichols*, 236.

On an appeal from a decree of the Probate Court allowing with certain modifications the accounts of a conservator of the property of a deceased ward, the allowance of which was opposed by the executor of the will of the ward, it was held that the single justice who heard the appeal was right in refusing as matter of law to allow charges of the conservator for services of counsel rendered and expenses incurred after the decree of the Probate Court was made. *Ibid.*

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tain modifications the account of the conservator, the question of taxable costs rests wholly in the discretion of the single justice who hears the appeals. *Day* v. *Nichols*, 236.

On an appeal from a decree of the Probate Court the appellant is confined to his objections to the decree appealed from which he has stated under the requirement of R. L. c. 162, § 10. *Murray* v. *Cangiano*, 435.

On an appeal from a decree of the Probate Court in which the objections to the decree appealed from were the same as those stated in Murray *v.* Cangiano, 435, and where there was no report of the evidence, it was held that there was nothing to support any of the objections stated. *Murray* v. *Fiorentini*, 466.

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Trial of jury issues on appeal, see next subtitle.

Trial of Issues by Jury on Appeal.

A single justice presiding at the trial before a jury in the Supreme Judicial Court, on an appeal from a decree of the Probate Court allowing the will of a woman, of issues relating to the execution and validity of the will, in the exercise of his discretion may permit an attorney at law who drew the will and who has made the opening statement to the jury in behalf of the proponent of the will to testify as a witness for the proponent, although such practice is not to be commended. *Holbrook* v. *Seagrave*, 26.

At the trial above described, there was no issue framed, and the contestants did not ask for any rulings, with reference to the conduct of the attorney who drew the will, on the theory that he was acting as agent for the chief beneficiary, and the presiding judge instructed the jury that no question arose as to whether the will was procured to be made by the attorney; and it therefore was held that an exception of the contestants must be overruled. *Ibid.*

The appellants at the trial, which occupied four days, of jury issues on an appeal from a decree of the Probate Court allowing a will, excepted to the exclusion of certain evidence in the nature of declarations by the testatrix, which was offered to show affection or dislike of the testatrix for certain relations and her interest in her church and in a charitable corporation, but the bill of exceptions did not purport to contain all the material evidence at the trial and it was held that the exceptions must be overruled. *Ibid.*

At the trial above described, there was evidence tending to show that the chief beneficiary under the will was a sister of the testatrix and that her husband was a physician and attended the testatrix at a hospital to which she had been taken by him and that the testatrix died at the hospital nineteen days after the will was executed, and it was held that the contestants were entitled to have the jury instructed that the law views with jealousy relations of this nature between a physician and his patient, especially where the patient is enfeebled by disease. *Ibid.*

Where, after a jury has retired and the justice who presided at the trial has gone to his home, the jury return and ask for further instructions which the Chief Justice of the court, who was not present at the trial, gives to them subject to exceptions of one of the parties, such exceptions cannot be considered by this court on a bill of exceptions allowed by the justice who presided at the trial; but must be presented by a bill allowed by the Chief Justice. *Holbrook* v. *Seagrave*, 26.

Costs.

Upon cross appeals taken by an executor and by the conservator of the property of the testatrix from a decree of the Probate Court allowing with certain modifications the account of the conservator, the question of taxable costs rests wholly in the discretion of the single justice who hears the appeals. *Day* v. *Nichols*, 236.

PROHIBITION, WRIT OF.

A writ of prohibition will not be issued to correct errors or irregularities of a tribunal that is acting within its jurisdiction, and can be invoked only to prevent such tribunal from exercising a jurisdiction that it does not possess. *Ashley* v. *Three Justices of Superior Court*, 63.

In an election petition brought under St. 1914, c. 783, § 10, charging a violation of the provisions of the corrupt practices act a plea in abatement, setting up a defence that the subpoena had been made returnable in fifteen days instead of fourteen days after the filing of the petition, was held to be within the jurisdiction of the Superior Court and not to be open upon a petition for a writ or prohibition, filed a few days after the plea. *Ibid.*

PROSTITUTION.

PERMITTING BUILDING TO BE USED FOR PROSTITUTION, see that title.

PROXIMATE CAUSE.

Failure to cool ashes was held not to have been negligence of an employer which caused injury to an employee from the splashing up of water, steam and heat caused when hot ashes were thrown into a pit. *Mammott* v. *Worcester Consolidated Street Railway*, 282.

Where one has been guilty of a negligent act which he knew was likely to cause harm to some person, he or his employer is none the less liable for an injury caused by the negligent act because he could not have foreseen the precise thing that happened. *Regan* v. *Cummings*, 414.

In an action by a workman for damages resulting from an unlawful interference with his employment by one who claimed to have an assignment of his wages, it was held that a portion of the judge's charge was correct which, properly interpreted, stated that, if the superintendent of the plaintiff's employer without further investigation mistakenly treated the plaintiff as the maker of the assignment of wages, the defendant, without whose unlawful interference the superintendent would not have acted, was the efficient cause of the plaintiff's discharge. *Doucette* v. *Sallinger*, 444.

PUBLIC OFFICER.

Member of the fire department of a city, who was driving a motor car of the department carrying the chief to a fire, was held not to be an employee or agent of the chief, who therefore was not liable for his negligence. *Skerry* v. *Rich*, 462.

PUBLIC SERVICE COMMISSION.

It was held that under the power conferred on the public service commission by St. 1913, c. 784, §§ 20, 21, that commission properly might authorize the successor of the Globe Street Railway Company to discontinue the sale under certain conditions of six tickets for a sum not exceeding twenty-five cents, although the sale of such tickets was required as a condition in the grant of location of that railway company. *Fall River* v. *Public Service Commissioners*, 575.

QUO WARRANTO.

The hearing of an election petition under the corrupt practices act is a civil proceeding in the nature of a quo warranto, and is not a criminal proceeding. *Ashley* v. *Three Justices of Superior Court*, 63.

RAILROAD.

Petition under St. 1906, c. 463, Part I, § 37, for damages resulting from the abolition of a grade crossing of a railroad with a highway. *Union Glass Co.* v. *Somerville*, 202.

Review by LORING, J., of the successive statutes in regard to division fences between railroad locations and the land of adjoining owners. *New York Central & Hudson River Railroad* v. *Clarke*, 274.

Under the provision of St. 1879, c. 205, § 2, as now amended in St. 1906, c. 463, Part II, § 104, an owner of adjoining land, who is bound by a covenant in a deed to make and maintain a division fence between his land and the location of the railroad, has the right at his election to build and maintain the division fence, and the right of the railroad corporation to build the fence at the reasonable expense of the landowner only arises when the landowner has elected not to perform the work himself. *Ibid.*

A covenant in a deed to a railroad corporation that the grantor will and that his heirs, executors and administrators shall make and maintain at all times thereafter a good and sufficient fence or fences or wall or walls on the boundary lines between the grantor's own land and the granted premises, "which fences or walls shall be forever kept, maintained and made at my expense and the expense of my heirs, executors, administrators and assigns," is a covenant running with the land and binding on the grantor's successors in title. *Ibid.*

Action against a railroad corporation for damages resulting from the plaintiff's horse being frightened by a swinging staging hung under a bridge over a highway for the use of persons painting the bridge. *Hurley* v. *Boston & Maine Railroad*, 365.

In an action by the owner of a pasture adjoining a railroad location against the railroad corporation for the alleged poisoning of heifers belonging to

the plaintiff, circumstantial evidence was held to have been insufficient to warrant a finding that arsenate of lead in certain kegs, assumed to have done the poisoning, was placed in the pasture by any negligence or wrongful act for which the defendant was responsible. *Gardner* v. *New York, New Haven, & Hartford Railroad*, 545.

See also NEGLIGENCE, *Railroad*.

REAL OR PERSONAL PROPERTY.

Upon subsidiary facts found by a master in a suit in equity involving the validity of contracts of conditional sale for heating apparatus and plumbing materials it was held that a finding by the master that the heating apparatus and the plumbing materials were personal property was warranted. *Nickels* v. *Scholl*, 205.

Equitable restrictions are real estate as a part of the land to which they are appurtenant. *Riverbank Improvement Co.* v. *Chadwick*, 242.

Growing crops, that were planted by a tenant at will in a part of a garden appurtenant to a tenement then occupied by him, continue to belong to him after his tenancy and occupation have been terminated by his landlord giving a lease in writing to a third person of the building containing his tenement. *Commonwealth* v. *Galatta*, 308.

RELEASE.

Where trustees terminated a trust by payments of the fund to a life beneficiary and to a son who had a vested interest in remainder, taking releases from them, that from the son being of all claims or demands to be made by him or his heirs or legal representatives, and the son died nineteen years after this transaction and the life beneficiary four years later, it was held that, if the executors as trustees had no right to end the trust and distribute the fund when they did so, the children of the son had no standing in court to complain of it, being bound by their father's release under seal. *Partridge* v. *Clary*, 290.

RES JUDICATA.

Where a suit in equity against a foreign corporation, which was begun by the insertion of the bill in a common law writ, is amended into an action at law, it remains the same proceeding, and a decision of this court, made in the suit in equity before the amendment, is the law of the case. *Reynolds* v. *Missouri, Kansas & Texas Railway*, 584.

RESTRICTIONS.

EQUITABLE RESTRICTIONS, see that title.

RULES OF COURT.

Equity Rule 31. See *Murphy* v. *Moore*, 565.

Rule 28 of the Superior Court. *Murch* v. *Clapp*, 569.

Rule 52 of the Superior Court. *Murch* v. *Clapp*, 569.
Rule 37 of the Municipal Court of the City of Boston. *Brown* v. *Learmouth*, 417.

SALE.

Conditional.

Under St. 1912, c. 271, § 1, if an original contract of conditional sale of heating apparatus signed by the purchaser and not by the seller is made within the required time in the clerk's office of the city in which the real estate is situated, this is constructive notice of the contract, and gives the seller as against the mortgagee of the real estate the right to remove such heating apparatus, if unpaid for. *Nickels* v. *Scholl*, 205.

Under the statute quoted above, the recording within the required time by the city clerk of such a contract of conditional sale is none the less constructive notice of the instrument to a mortgagee of the house because the city clerk by mistake omitted to index the record of the contract in the name of the purchaser of the plumbing materials and inserted in the index only the name of their seller. *Ibid.*

Upon subsidiary facts found by a master in a suit in equity involving the validity of contracts of conditional sale for heating apparatus and plumbing materials it was held that a finding by the master that the heating apparatus and the plumbing materials were personal property was warranted. *Ibid.*

One, who is in possession of a motor car as the purchaser under a contract of conditional sale by which the title to the car is to pass to him upon the payment of the final instalment of the purchase money and who has committed no breach of the contract, has a special property in the car which makes him its "owner" for the purposes of registration within the meaning of St. 1909, c. 534, § 2, as amended by St. 1912, c. 400. *Hurnanen* v. *Nicksa*, 346.

SANITY.

Evidence at the trial of an issue relating to the soundness of mind of a testatrix, which was held to justify a refusal to rule that there was no evidence that would justify a finding that the alleged testatrix was of unsound mind because the burden was on the proponent of the will to show that the alleged testatrix was of sound mind, and that with the evidence shown in the record the general presumption of sanity did not as matter of law require a finding of testamentary capacity. *Panell* v. *Rosa*, 594.

SAVINGS BANK.

Where a depositor in a savings bank assents at the time of his first deposit, in accordance with a notice printed on his bank book, "to all the regulations of the institution," this does not incorporate in his contract with the bank a by-law subsequently adopted, without the knowledge of the depositor, relating to notice to the corporation if the deposit book became lost. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

Savings Bank (*continued*).

A depositor in a savings bank is not bound by a by-law of the bank, passed without his knowledge about four years after the contract of deposit was made, that "Any payment made to any person who presents a deposit book of this bank, or who shall present an order for the payment of money accompanied with such deposit book purporting to have been signed by the person to whom such book belongs, shall be deemed to be for the Bank as good and effectual a payment as that made to the owner of such deposit book." *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

In an action by a fraternal beneficiary corporation against a savings bank for the amount of deposits drawn out by the plaintiff's treasurer upon forged orders, remissness of the plaintiff's auditors, in failing to discover that the treasurer was misappropriating the funds of the corporation or was obtaining money from the savings bank on forged orders, was held not to be evidence that the corporation participated in the treasurer's fraud and not to require a finding that the corporation was so negligent in failing to discover the fraud as to lose its right to recover the amount paid by the bank on the forged orders. *Ibid.*

In the case stated above where the defendant relied, as an equitable defence under R. L. c. 173, § 28, on the facts that the plaintiff's dishonest treasurer, who drew $3,345 on forged orders out of the savings bank, used for himself only $250 and that the remaining $3,095 was deposited in another bank in the plaintiff's name and was used in paying sick benefits and other legal obligations of the plaintiff, a finding of the judge that the plaintiff could recover only $250 was held to be right. *Ibid.*

SCIRE FACIAS.

A writ of scire facias issued under R. L. c. 189, §§ 45–49, to enforce a judgment charging the defendant as trustee in an action brought by trustee process, is not an independent civil action but is a judicial writ to enforce a judgment and is a part of the proceedings in the original action. *Universal Optical Corp.* v. *Globe Optical Co.* 84.

Under the circumstances, a trustee in an action brought by trustee process in the Municipal Court of the City of Boston was held to have no right of appeal to the Superior Court from a judgment against him upon scire facias issued upon an original judgment affirmed on report of the Appellate Division. *Ibid.*

SET-OFF.

In an action of contract no set-off can be allowed to the defendant where he has filed no declaration in set-off. *Taylor* v. *Kennedy*, 390.

In an action by a fraternal beneficiary corporation against a savings bank for money paid out by the defendant on forged orders of the plaintiff's treasurer, the defendant relied, as an equitable defence, upon allegations that a part only of the money so paid out by the defendant was used by the fraudulent treasurer for his own purposes, the remainder being deposited in another bank to the plaintiff's credit and used for its purposes, and, the plaintiff not demurring to the equitable defence on the ground that the remedy at law was plain and adequate, it was said that it was unnecessary to con-

sider whether the defendant could have recovered under a declaration in set-off for money had and received. *St. Jean Baptiste Societe de Millbury* v. *Worcester County Institution for Savings*, 556.

SEWER.

In a suit in equity it was found by a master that two streets, the fee to which was in the plaintiff, never had been laid out as public ways and never had become such ways by dedication or prescription and that the use of them by the public was permissive, and it appeared that the town in which they lay, against which the suit was brought, with knowledge of the plaintiff's claim of ownership and against his protest had constructed sewers through these streets without authority to do so, and it was held that the plaintiff was not required to accept indemnity in money damages and was entitled to relief by injunction. *Brown* v. *Peabody*, 52.

In the same suit it appeared that the abuttors on the two streets generally had made connections with the sewers constructed by the defendant and that sewer assessments had been laid by the defendant and had been paid by the abuttors, and it was held that, in view of these facts, the defendant should be allowed a reasonable time within which it might acquire by proper legal proceedings the right to lay and maintain its sewers in the two private streets, if it should choose to do so. *Ibid.*

Accordingly a decree was entered awarding an injunction and commanding the defendant to remove the sewers within five months unless previously the defendant should have acquired the legal right to their maintenance, the court in the meantime retaining the bill for the assessment of damages already suffered. *Ibid.*

In the case above described it was found by a master that the plaintiff was damaged in the sum of $250 by reason of the acts of the defendant, which sum included all past and future damages that might accrue to him, and it was held that the maintenance of the sewers in the plaintiff's land was a substantial continuing trespass, for which an assessment of past and future damages could not be made rightfully without the plaintiff's consent. *Ibid.*

SHIP.

Conflicting evidence upon an issue in regard to the cause of the decay of the timbers and planking of a chartered tugboat was held properly to have been left to the jury with careful instructions. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

Facts agreed to upon a hearing of a petition against the city of Gloucester under St. 1909, c. 490, Part I, § 77, appealing from the refusal of the assessors of that city to abate a tax upon fishing vessels belonging to the petitioner, a Maine corporation, were held not enough to fix the *situs* of the vessels at Gloucester for purposes of taxation, and that on the record the petitioner was entitled as matter of law to an abatement of the portion of its tax imposed upon these vessels. *Atlantic Maritime Co.* v. *Gloucester*, 519.

STATUTE.

The provisions of St. 1911, c. 751, Part I, § 1, doing away with certain defences in actions for personal injuries sustained by employees in the course of their employment, have no application to personal injuries received by an employee outside this Commonwealth. *Cogliano* v. *Ferguson*, 147.

The omission of St. 1852, c. 312, § 9, re-enacted in substance in Gen. Sts. c. 129, § 9, and in Pub. Sts. c. 167, § 9, from R. L. c. 173, § 11, was held to have been intentional. *Whiting* v. *Houghton*, 429.

STATUTES CITED AND EXPOUNDED.

See page 763.

STREET RAILWAY.

The provision of St. 1898, c. 578, § 11, relieving street railway corporations from all obligations as to surface repairs of streets, roads and bridges unless the obligation to do so had been imposed in a grant of original location, was not repealed nor superseded by St. 1911, c. 552, so as to revive such an obligation on the part of the Globe Street Railway Company. *Fall River* v. *Public Service Commissioners*, 575.

It was held that under the power conferred on the public service commission by St. 1913, c. 784, §§ 20, 21, that commission properly might authorize the successor of the Globe Street Railway Company to discontinue the sale under certain conditions of six tickets for a sum not exceeding twenty-five cents, although the sale of such tickets was required as a condition in the grant of location of that railway company. *Ibid.*

Actions founded on alleged negligence of street railway corporations or their employees, see appropriate subtitle under NEGLIGENCE.

SUPERIOR COURT.

Under St. 1914, c. 783, § 10, (*c*) an assignment of three judges who are to hear and determine all matters arising under election petitions during the year, including a petition already filed, made by the Chief Justice nearly three months after the last annual State election on the day following the granting of an order that there was reasonable cause to believe that a corrupt practice had been committed, was held to be a valid assignment. *Ashley* v. *Three Justices of Superior Court*, 63.

In an election petition brought under St. 1914, c. 783, § 10, charging a violation of the provisions of the corrupt practices act a plea in abatement, setting up a defence that the subpoena had been made returnable in fifteen days instead of fourteen days after the filing of the petition, was held to be within the jurisdiction of the Superior Court and not to be open upon a petition for a writ of prohibition, filed a few days after the plea. *Ibid.*

The exclusive jurisdiction in equity conferred upon the Supreme Judicial Court by R. L. c. 159, § 2, is confined to matters not within the general principles of chancery jurisdiction and cognizable under statutes which

do not provide expressly that the Superior Court also shall have jurisdiction. *Williams* v. *Nelson*, 191.

The Superior Court, under its general chancery jurisdiction, has jurisdiction of suits in equity brought under St. 1914, c. 464, by those who have obtained judgments for bodily injury or death by accident against defendants who were insured against such loss or damage when the right of action arose, to reach and apply the insurance money to the satisfaction of such judgments. *Ibid.*

It was assumed, but without so deciding, that an appeal to a judge of the Superior Court from an order of a building inspector under St. 1913, c. 655, § 55, applying for an order forbidding the enforcement of the order of the inspector is a "civil cause" within the meaning of R. L. c. 173, § 106, so that it may be brought before this court upon exceptions alleged in the Superior Court under that statute. *Stevens, landowner*, 368.

One, who under St. 1913, c. 655, § 55, has appealed to a judge of the Superior Court from an order of a building inspector applying for an order forbidding the enforcement of the order of the inspector, cannot be heard in that proceeding to contend that the statute of which he is taking advantage is unconstitutional in not providing for a trial by jury as to the establishment of the fundamental facts on which the jurisdiction of the inspector rested. *Ibid.*

SUPREME JUDICIAL COURT.

The court has no jurisdiction under R. L. c. 148, § 15, to authorize an executor to adjust by compromise a controversy concerning a will by an agreement to which trustees to whom property is devised and bequeathed by the will are not parties. *Ellis* v. *Hunt*, 39.

The exclusive jurisdiction in equity conferred upon the Supreme Judicial Court by R. L. c. 159, § 2, is confined to matters not within the general principles of chancery jurisdiction and cognizable under statutes which do not provide expressly that the Superior Court also shall have jurisdiction. *Williams* v. *Nelson*, 191.

Under R. L. c. 162, § 23, the authority of the Supreme Judicial Court upon an appeal from the Probate Court is limited necessarily to the issues heard and determined in the Probate Court, and the statute cannot be construed to confer on the Supreme Judicial Court jurisdiction to determine matters not necessarily involved in the determination of the issues before the Probate Court. *Day* v. *Nichols*, 236.

Upon a report by a single justice who heard a petition for a writ of mandamus, which is a proceeding at law, this court has no jurisdiction to change or reverse a decision as to the facts made by the single justice who heard the the case unless the finding of fact is not warranted by the evidence. *Mansfield* v. *Secretary of the Commonwealth*, 262.

SURETY.

In a suit in equity to enjoin the defendants from enforcing a bond, given to dissolve an injunction in another suit and signed by the plaintiff as principal and by the corporation as surety, it does not help the plaintiff to show that the bill in equity on which the injunction was granted was amended with-

out notice to the surety, if the amendment was immaterial because the injunction was granted on the allegations of the original bill as it stood before the amendment. *Kirby* v. *Donovan*, 86.

One of five sureties, who with their principal signed a promissory note as joint makers, if he pays the whole balance due on the note can maintain an action at law against one of his co-sureties to enforce contribution, and in such action can recover from the defendant one fifth of the amount paid by him. *Durfee* v. *Kelly*, 571.

Where in such action it appears that one of the co-sureties had died before the plaintiff paid the balance due on the note, this does not change the proportion that he can recover from the defendant. *Ibid.*

A surety thus sued for contribution can set up the defence that he was discharged from his liability as surety, at least to the extent that he was injured thereby, by an arrangement made by the payee of the note with the principal maker without the consent or knowledge of the sureties whereby the payee gave up a part of the collateral security. *Ibid.*

In the same case it was held that this defence was not open to the defendant in the present case because it was not pleaded by him. *Ibid.*

Where the shares in a corporation held as collateral security for the payment of a promissory note signed by sureties as well as by the principal debtor have declined in value, the failure of the payee of the note to sell the shares before the decline does not discharge the sureties, if no wrongful conduct on the part of the payee appears and the sureties have stood by and let the decline in value proceed when they might have paid the note and have received and sold the collateral security. *Ibid.*

TAX.

Abatement.

Failure of the executor of the will of a testator who died in France on December 1, 1911, a resident of a town in this Commonwealth, to file a list of the property of the decedent with the assessors of the town of his domicil before January, 1913, was held not to have been a compliance with the requirement of St. 1909, c. 490, Part I, § 73, so that the condition precedent to an abatement of the taxes upon the estate of the testator for the year 1912 had not been performed, and accordingly that such an abatement could not be made. *Parsons* v. *Lenox*, 231.

Want of knowledge of the law requiring the filing of such a sworn list is no excuse for delay in the filing. *Ibid.*

On Tangible Personal Property.

Facts agreed to upon a hearing of a petition against the city of Gloucester under St. 1909, c. 490, Part I, § 77, appealing from the refusal of the assessors of that city to abate a tax upon fishing vessels belonging to the petitioner, a Maine corporation, were held not enough to fix the *situs* of the vessels at Gloucester for purposes of taxation, and that on the record the petitioner was entitled as matter of law to an abatement of the portion of its tax imposed upon these vessels. *Atlantic Maritime Co.* v. *Gloucester*, 519.

On Legacies and Successions.

The trustees under the will of Edwin Ginn were instructed that, as to all succession taxes which they were required to pay, the will under interpretation containing no provision otherwise, the legacy and succession taxes on the several annuities which the trustees were directed to pay were payable out of the capital fund of the trust. *Parkhurst* v. *Ginn*, 159.

A corporation named the World Peace Foundation, organized under the laws of this Commonwealth, which was a beneficiary under the will of Edwin Ginn, who had organized it, was held to be a charitable society or institution within the meaning of St. 1912, c. 678, § 1, and St. 1909, c. 490, Part I, § 5, and accordingly the passing of property to it by will was held not to be subject to a legacy and succession tax. *Parkhurst* v. *Treasurer & Receiver General*, 196.

Whether the passing of a gift by will to a corporation is subject to a legacy and succession tax, or whether it is exempt from such a tax as the passing of a gift to a charitable society or institution, depends on the purposes and work of the corporation at the time of the death of the testator, when his will took effect after it was proved, and subsequent acts of the corporation only can be material so far as they tend to show what the character of the corporation was at that time. *Ibid.*

On Trust Property.

Trustees under the will of Edwin Ginn were instructed that the ordinary annual taxes were to be paid as a part of the expenses of the trust to be deducted before the net income could be ascertained. *Parkhurst* v. *Ginn*, 159.

Upon the same bill for instructions it was held that, the will under interpretation containing no provision otherwise, the legacy and succession taxes on the several annuities which the trustees were directed to pay were payable out of the capital fund of the trust. *Ibid.*

On Business Corporation.

St. 1914, c. 724, relating to an excise tax upon foreign corporations is constitutional and valid. *International Paper Co.* v. *Commonwealth*, 101.

If the statute imposing an excise on foreign corporations doing business in Massachusetts discriminates in favor of the large and against the small corporations, one of the class of the large corporations cannot be heard to complain of this discrimination by which it is not aggrieved. *Ibid.*

The fact that a foreign corporation doing business in this Commonwealth acquired its real estate in Massachusetts while St. 1903, c. 437, § 75, was in force and before the enactment of St. 1907, c. 578, (now St. 1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724,) does not show that such corporation has been denied the equal protection of the laws by being made subject to the excise imposed by the later statutes. *Ibid.*

Charter provisions of a foreign corporation, engaged in this Commonwealth in the manufacture of paper, and the facts as to its business here and in other States were held not to make unlawful an excise imposed under St.

1909, c. 490, Part III, § 56, as amended by St. 1914, c. 724, for doing business in this Commonwealth. *International Paper Co.* v. *Commonwealth*, 101.

It was said to be manifest that a State is not debarred from imposing an excise upon the granted privilege of being a corporation because the corporation is engaged in interstate commerce. *Ibid.*

It also was said that it seemed to be indubitable that the use by a State of a percentage on the authorized capital stock of a foreign corporation as the measure of an excise or license fee imposed for permission to such foreign corporation to do an intrastate or local business within its borders is not a decisive element in determining the validity of the imposition of the tax. *Ibid.*

It was held that the objection, that the excise imposed on foreign corporations doing business here by the above described statutes is unconstitutional because it is unreasonable in amount, could not be raised by a foreign corporation which under the circumstances had the option of giving up the local commerce and business if it did not care to prosecute them under the excise imposed. *Ibid.*

As to a contention that a certain excise imposed upon a certain large foreign corporation was unconstitutional because unreasonable in amount, it was said that the court "know of no principle of law which requires the conclusion that a license fee of that amount is unduly or unreasonably great, to a corporation of such large capital as the petitioner, for the privilege of admission to the local markets of this Commonwealth for the transaction of an intrastate business in the manufacture and sale of an undisclosed quantity of paper of undisclosed value and out of which an undisclosed profit is realized." *Ibid.*

A foreign corporation doing business in this Commonwealth and subject to the excise imposed by St. 1909, c. 490, Part III, § 56, after an increase of its authorized capital stock is not relieved from liability to pay a correspondingly larger excise by the fact that the proceeds of the additional stock issued by the corporation have been invested wholly in the extension and improvement of its manufacturing plant outside this Commonwealth. *Locomobile Co. of America* v. *Commonwealth*, 117.

List to be filed with Assessor.

Failure of the executor of the will of a testator who died in France on December 1, 1911, a resident of a town in this Commonwealth, to file a list of the property of the decedent with the assessors of the town of his domicil before January, 1913, was held not to have been a compliance with the requirement of St. 1909, c. 490, Part I, § 73, so that the condition precedent to an abatement of the taxes upon the estate of the testator for the year 1912 had not been performed, and accordingly that such an abatement could not be made. *Parsons* v. *Lenox*, 231.

Want of knowledge of the law requiring the filing of such a sworn list is no excuse for delay in the filing. *Ibid.*

In the case described above it was said that it was not necessary to consider whether the jurat before a notary public would have been sufficient under St. 1909, c. 490, Part I, § 43. *Ibid.*

Sale for Non-payment.

One who as a devisee is seised of real estate, of which he is in possession and control, can maintain a suit in equity to remove from his title a cloud created by an invalid tax sale and a deed given thereunder. *Fuller* v. *Fuller*, 441.

Where a recital in a tax collector's deed, given in pursuance of a sale for non-payment of taxes, states that a demand was made on a certain former owner of the land for payment of the tax, and it is shown that at the time of such alleged demand the former owner was dead and was known to be dead by the person who procured the making of the tax sale, and where the tax collector had constructive notice of the death of the delinquent taxpayer by the probate records of the admission of his will to probate and of the appointment of an executrix, it is plain that "the name of the person on whom the demand for the tax was made" was not inserted in the deed as required by R. L. c. 13, § 43, and that the deed is absolutely void. *Ibid.*

TENANTS IN COMMON.

See JOINT TENANTS AND TENANTS IN COMMON.

TENEMENT HOUSE.

Application, operation and constitutionality of the provisions of St. 1913, c. 655, relating to the regulation of the maintenance and use of tenement houses, See BUILDING LAWS.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRESPASS.

In a suit in equity it was found by a master that two streets, the fee to which was in the plaintiff, never had been laid out as public ways and never had become such ways by dedication or prescription and that the use of them by the public was permissive, and it appeared that the town in which they lay, against which the suit was brought, with knowledge of the plaintiff's claim of ownership and against his protest had constructed sewers through these streets without authority to do so, and it was held that the plaintiff was not required to accept indemnity in money damages and was entitled to relief by injunction. *Brown* v. *Peabody*, 52.

In the same suit it appeared that the abuttors on the two streets generally had made connections with the sewers constructed by the defendant and that sewer assessments had been laid by the defendant and had been paid by the abuttors, and it was held that, in view of these facts, the defendant should be allowed a reasonable time within which it might acquire by proper legal proceedings the right to lay and maintain its sewers in the two private streets, if it should choose to do so. *Ibid.*

Accordingly a decree was entered awarding an injunction and commanding the defendant to remove the sewers within five months unless previously the defendant should have acquired the legal right to their maintenance,

the court in the meantime retaining the bill for the assessment of damages already suffered. *Brown* v. *Peabody*, 52.

In the case above described it was found by the master that the plaintiff was damaged in the sum of $250 by reason of the acts of the defendant, which sum included all past and future damages that might accrue to him, and it was held that the maintenance of the sewers in the plaintiff's land was a substantial continuing trespass, for which an assessment of past and future damages could not be made rightfully without the plaintiff's consent. *Ibid.*

TRUST.

Creation.

Certain agreement under which a bank, as the means of advancing money to a dealer to pay for an importation of hides, purchased the hides in its own name directly from the foreign seller and delivered them to the dealer was held to create a valid trust so that the dealer held the hides with the obligations incidental to the fiduciary relation. *Peoples National Bank* v. *Mulholland*, 152.

Oral.

Bill in equity by the son of the owner of certain real estate who had conveyed it to his sister by an absolute deed under an oral agreement that she should hold the land in trust for her own benefit during her life and that after her death it should become the property of the plaintiff, and that, if the real estate should be converted into money, the proceeds from the sale should be held by the grantee to enjoy the income during her life and that on her death the grantor's son should be the sole beneficiary and owner of such proceeds, was maintained where the real estate was sold during the grantee's life, that part of the oral agreement relating to the proceeds of the sale being separate and distinct and enforceable as a valid oral trust in personal property. *Chace* v. *Gardner*, 533.

Trusts with Shares represented by Transferable Certificates.

An attachment of land as the land of W standing in his name as trustee, where it appears that W held the land under an instrument creating a real estate trust with the interests of the beneficiaries represented by certificates, that all the certificates were indorsed to W, that nobody else had paid anything for them and that they were treated by him as his own, is a valid attachment. *Cunningham* v. *Bright*, 385.

Under R. L. c. 128, § 37, which provides that a registration of title by the Land Court shall bind the land and quiet the title thereto and shall be conclusive upon and against all persons, a decree of that court, that the title to certain land is in W as trustee, is not contradicted nor falsified by showing that W was trustee only for himself and that the words of the decree meant simply that the title was in W as an individual. *Ibid.*

Charitable.

See CHARITY.

Construction of Instrument creating Trust.

Under a provision in a will creating a trust, the income of which should be divided between her two daughters, and providing "And if both my said daughters shall die leaving no child which shall attain the age of twenty-one years, then the whole of said deceased sisters share I give devise and bequeath to my" two sons, it was held that the two sons took a vested interest in the trust fund, and the share of each was transmissible by will or subject to distribution as property under the laws regulating the descent and distribution of intestate estates. *Whitman* v. *Whitney*, 18.

Construction of a residue clause of a will upon which it was held that the testatrix did not intend to control or direct the disposition of the residue of a trust estate after it had become vested in her sons; and therefore that the property, which under the will had vested in the second son at the death of the testatrix, on his death passed from him by the laws of intestate descent and distribution, and not under the will. *Ibid.*

Upon a construction of provisions of the will of Edwin Ginn relating to the World Peace Foundation, a charitable corporation which the testator in his lifetime had caused to be incorporated, it was held that the trust was to be administered as one fund and that the trustees were not to set apart any of the trust property as a separate fund for the benefit of the World Peace Foundation. *Parkhurst* v. *Ginn*, 159.

Further instructions were given upon the same bill for instructions, in answer to a question as to the method by which the amount or the rate of income payable to the World Peace Foundation was to be reckoned. *Ibid.*

Upon the same bill for instructions it was held that in reckoning the amount of income payable to the World Peace Foundation in any year, the entire proceeds of the sales of vacant real estate should be treated as a part of the principal of the trust property and should not be apportioned between principal and income. *Ibid.*

Upon the same bill for instructions it was held that the premiums on the bonds given by the trustees, as authorized to be paid by R. L. c. 150, § 15, should be paid out of income and not out of principal. *Ibid.*

Upon the same bill for instructions it was held that, the will under interpretation containing no provision otherwise, the legacy and succession taxes on the several annuities which the trustees were directed to pay were payable out of the capital fund of the trust. *Ibid.*

Upon the same bill for instructions it was pointed out that by the express terms of the trust the testator directed that the annuities to his family should be preferred to all other legacies in case of a deficiency and that in case of necessity they should be a charge upon both principal and income, although this did not appear to be material in the present state of the trust. *Ibid.*

Upon the same bill for instructions it was held that, as stated above, the entire trust fund was to be treated as a unit and that all the annuities were to be paid out of it instead of being supported by the establishment of separate funds. *Ibid.*

In the same case a like conclusion was reached in regard to certain shares in the corporation owning the business formerly carried on by the testator which were to be kept available for two sons of the testator. *Ibid.*

In the same case the court declined to instruct the trustees as to the income which in a contingency might be payable to one or both of the sons of the testator, there being no present obligation on the part of the trustees to set apart any income for this purpose, and a broad discretion as to the management of the trust being vested in the trustees with which this court would not undertake to interfere. *Parkhurst* v. *Ginn*, 159.

In the same case it was pointed out in regard to the income to be paid to the World Peace Foundation that there was no provision in the terms of the trust for making up a deficiency in one year out of the excess of another year. *Ibid.*

In the same case under certain provisions of the will and under all the circumstances that appeared on the record, it was held that the time had arrived for the payment of certain legacies by the trustees which were presently payable and that they should not be withheld longer. *Ibid.*

In the same case it was held that, as these legacies became due only upon the happening of the contingency that principal of the estate had become available for such payment after satisfying all prior legacies, absolute and contingent, that event should be considered to have happened on April 11, 1916, and not before, and that therefore the absolute legacies should bear interest from that date at the rate of four per cent per annum in accordance with St. 1915, c. 151, § 2. *Ibid.*

In the same case it was held that the trustees should retain for the time being as a part of the capital of the fund the balance of the accumulated cash, whether of principal or income, and that they should not distribute at present any part of the final residue of the estate. *Ibid.*

In the same case it was held that, although the power to invest and reinvest the trust fund was not conferred expressly upon the trustees, this power was conferred by necessary implication, because, in order to perform the duties required of them, the trustees necessarily must invest and keep invested the trust funds safely and productively in such property and securities, as are recognized as appropriate for trust funds or were authorized by the will. *Ibid.*

In the same case it was held that certain annuities provided by the testator for two of his children clearly were intended for the life of each and for no less period. *Ibid.*

A testator devised and bequeathed the residue of his estate to his executors as trustees to pay during the life of his wife one half of the net income to his wife and the other half of the net income to his son and, upon the death of his wife, to pay, convey and deliver all the property to his son, "to have and to hold to him and his heirs and assigns forever;" and it was held that the son took a vested remainder. *Partridge* v. *Clary*, 290.

It was held that, under the provisions of the will of Gordon McKay, Harvard University had no authority to make with the Massachusetts Institute of Technology an agreement whereby three fifths of the income of an endowment fund to promote applied science were to be devoted to an engineering school which should be carried on at the institute and be controlled and conducted by the institute, vesting practically in the institute the substantial organization, control, direction and administration of the work to be done under the agreement. *Harvard College* v. *Attorney General*, 396.

Upon the construction of the residuary clause of a will containing the words, "And upon the decease of either of said sons or daughters leaving no issue then said Trustees shall pay over and convey the whole of the trust share and estate of such deceased son or daughter to my right heirs at law," it was held that the words "my right heirs at law" meant those sons and daughters of the testator and the issue of any deceased child who were living at the time of the testator's death. *State Street Trust Co.* v. *Sampson*, 411.

It was held that, under the provisions of a trust under a will relating to payment of income to testator's children and on their death for their children, "and each of my grandchildren, on arriving at the age of twenty-one years is to receive his or her share or proportion of said rest, residue & remainder of my estate," the interest in remainder of a grandchild of the testator who had died before the testator's child, her mother, vested immediately upon the testator's death and was not contingent upon such grandchild surviving her mother, and therefore was disposed of by such grandchild's will. *Welch* v. *Colt*, 511.

A provision in the same will as to the sale of real estate by the trustee only with the consent in writing of a certain one of the daughters of the testator without requiring the consent of such of her children as should have reached the age of twenty-one years was held not to show that the testator did not regard the children of that daughter as having a vested interest in such real estate during the life of their mother. *Ibid.*

In the same case it was held that, in the expression "In the event of the decease of either of my children without leaving lawful issue," the testator used the word "issue" in its ordinary sense of all lineal descendants and not as meaning children. *Ibid.*

Where the language of the residuary clause in a carefully drawn will relating to a trust incorporates the language of the statute of distributions in force when the will was made, which also was in force at the time of the death of the testator, and where no reason is shown for a different interpretation, the construction of the clause should follow the judicial construction of the statute. *Green* v. *Hussey*, 537.

Application of the foregoing as to a will of a testatrix, who made her will and died when Gen. Sts. c. 91, § 1, cl. 1, was in force, wherein the trustees were ordered to distribute and divide the whole of the residuary estate "to and among all the lineal descendants then living of my grandfather, G H, and if all the lineal descendants aforesaid then living are in the same degree of kindred to the said G H, they shall share the said Estate equally and shall be paid in equal shares; otherwise they shall take according to the right of representation." *Ibid.*

Termination.

Where trustees terminated a trust by payments of the fund to a life beneficiary and to a son who had a vested interest in remainder, taking releases from them, that from the son being of all claims or demands to be made by him or his heirs or legal representatives, and the son died nineteen years after this transaction and the life beneficiary four years later, it was held that, if the executors as trustees had no right to end the trust and distribute the fund when they did so, the children of the son had no standing in court

to complain of it, being bound by their father's release under seal. *Partridge* v. *Clary*, 290.

It also was held that, even if it were open to the appellants to object to the transaction by which the trust property was divided, there was nothing to show that the life beneficiary and the son did not receive each the full value of their respective interests in the fund, in the division of which the son had acquiesced during the nineteen years that he had lived thereafter. *Ibid.*

Capital and Income.

Upon a construction of the provisions of the will of Edwin Ginn relating to the World Peace Foundation, it was held that in reckoning the amount of income payable to the World Peace Foundation in any year, the entire proceeds of the sales of vacant real estate should be treated as a part of the principal of the trust property and should not be apportioned between principal and income. *Parkhurst* v. *Ginn*, 159.

Upon the same bill for instructions it was held that the premiums on the bonds given by the trustees, as authorized to be paid by R. L. c. 150, § 15, should be paid out of income and not out of principal. *Ibid.*

Upon the same bill for instructions it was held that the ordinary annual taxes were to be paid as a part of the expenses of the trust to be deducted before the net income could be ascertained. *Ibid.*

Upon the same bill for instructions it was held that, the will under interpretation containing no provision otherwise, the legacy and succession taxes on the several annuities which the trustees were directed to pay were payable out of the capital fund of the trust. *Ibid.*

Where the two trustees holding a trust fund created by will were also the beneficiaries for life of the trust, being entitled to the income of the trust in equal shares, and where one of these trustees wilfully misappropriated a large amount of the trust property and his co-trustee, who was shown to have been culpably negligent in permitting the misappropriation to occur, died, a new trustee was instructed that he should pay the general expenses incident to the investigation and recovery of misappropriated funds and of real estate fraudulently sequestered out of income in his hands which under the terms of the trust would go to the former trustees as beneficiaries, instead of from the capital of the trust which belonged to blameless remaindermen. *Cogswell* v. *Weston*, 219.

In the case stated above it was pointed out that the fact that one of the former trustees and beneficiaries had died was immaterial, as those who claimed under the beneficiaries stood in their shoes. *Ibid.*

In the same case it also was pointed out that the fact, that the full amount misappropriated from the capital of the trust fund had been restored by the surety upon the probate bond of the defaulting trustee, did not change the equities of the case, because, after the amount taken had been paid back, the trust fund still would be depleted by the amount of the expenses named above. *Ibid.*

In the same case it also was held that, if the new trustee, before the payment made by the surety, had found the trust fund so depleted that he was obliged at the start to use some of the capital to meet the general expenses caused by the faithlessness of the trustees, the capital should be made whole

by restoring to it this amount out of the income payable to the beneficiaries whose active or culpable fault as trustees had caused the expenses. *Cogswell* v. *Weston*, 219.

Upon the same bill for instructions, in answer to another question, it was held that the expenses incidental to the prosecution of the action on the probate bond against the defaulting trustee and his surety could not be charged to income, because of the theory of the law that the taxable costs prescribed by the Legislature and recoverable in such an action on the bond were a full indemnity for these expenses. *Ibid.*

Trustee's Authority and Power.

Upon a bill for instructions by the trustees under the will of Edwin Ginn, it was held that, although the power to invest and reinvest the trust fund was not conferred expressly upon the trustees, this power was conferred by necessary implication, because, in order to perform the duties required of them, the trustees necessarily must invest and keep invested the trust funds safely and productively in such property and securities as are recognized as appropriate for trust funds or were authorized by the will. *Parkhurst* v. *Ginn*, 159.

Administration.

Upon a construction of provisions of the will of Edwin Ginn relating to the World Peace Foundation, a charitable corporation which the testator in his lifetime had caused to be incorporated, it was held that the trust was to be administered as one fund and that the trustees were not to set apart any of the trust property as a separate fund for the benefit of the World Peace Foundation. *Parkhurst* v. *Ginn*, 159.

Further instructions were given upon the same bill for instructions, in answer to a question as to the method by which the amount or the rate of income payable to the World Peace Foundation was to be reckoned. *Ibid.*

Upon the same bill for instructions it was held that the ordinary annual taxes were to be paid as a part of the expenses of the trust to be deducted before the net income could be ascertained. *Ibid.*

Upon the same bill for instructions it was held that the premiums on the bonds given by the trustees, as authorized to be paid by R. L. c. 150, § 15, should be paid out of income and not out of principal. *Ibid.*

In the same case it was held that, although the power to invest and reinvest the trust fund was not conferred expressly upon the trustees, this power was conferred by necessary implication, because, in order to perform the duties required of them, the trustees necessarily must invest and keep invested the trust funds safely and productively in such property and securities as are recognized as appropriate for trust funds or were authorized by the will. *Ibid.*

In the same case it was held that the trustees should retain for the time being as a part of the capital of the fund the balance of the accumulated cash, whether of principal or income, and that they should not distribute at present any part of the final residue of the estate. *Ibid.*

Apportionment of Expenses caused by Misconduct of Trustee.

Where the two trustees holding a trust fund created by will were also the beneficiaries for life of the trust, being entitled to the income of the trust in equal shares, and where one of these trustees wilfully misappropriated a large amount of the trust property and his co-trustee, who was shown to have been culpably negligent in permitting the misappropriation to occur, died, a new trustee was instructed that he should pay the general expenses incident to the investigation and recovery of misappropriated funds and of real estate fraudulently sequestered out of income in his hands which under the terms of the trust would go to the former trustees as beneficiaries, instead of from the capital of the trust which belonged to blameless remaindermen. *Cogswell* v. *Weston*, 219.

In the case stated above it was pointed out that the fact that one of the former trustees and beneficiaries had died was immaterial, as those who claimed under the beneficiaries stood in their shoes. *Ibid.*

Upon the same bill for instructions, in answer to another question, it was held that the expenses incidental to the prosecution of the action on the probate bond against the defaulting trustee and his surety could not be charged to income, because of the theory of the law that the taxable costs prescribed by the Legislature and recoverable in such an action on the bond were a full indemnity for these expenses. *Ibid.*

In the same case it also was pointed out that the fact, that the full amount misappropriated from the capital of the trust fund had been restored by the surety upon the probate bond of the defaulting trustee, did not change the equities of the case, because, after the amount taken had been paid back, the trust fund still would be depleted by the amount of the expenses named above. *Ibid.*

Commingling of Trust Property.

One, who without justification and in breach of fiduciary obligation has commingled his own property with that of another with which he has been entrusted, must at his peril return to the owner that which thus has been appropriated by him wrongfully and must prove what belongs to him or lose it. *Peoples National Bank* v. *Mulholland*, 152.

In a suit to enforce against a dealer in hides a trust, whereby the defendant held certain hides under a certain trust agreement with a bank, it was held that it was the duty of the dealer to keep the hides at all times, both in their raw and their manufactured state, "separate and capable of identification." *Ibid.*

It furthermore was held that that duty was not performed by having one person alone, who afterwards died, sufficiently familiar with the goods to be able to make a separation, and that, on the death of such person, there was a breach of the duty of the dealer under the trust receipt in having commingled the trust property with other hides so that the possibility of picking out from the mass the property of the bank was gone. *Ibid.*

In the case above described it appeared that a separate deposit had been made by the dealer of the proceeds received from sales of a part of the commingled goods to a certain corporation, and it was held that this separate deposit

stood on the same footing as the unsold part of the commingled goods and was impressed with a like trust for the benefit of the plaintiff. *Peoples National Bank* v. *Mulholland*, 152.

In the same case it was held that such commingling was done by the dealer in disregard of its obligation to the bank and was a breach of its fiduciary duty. *Ibid.*

In the same case it was held that there had been a sufficient tracing of the hides of the bank into the commingled mass to establish a lien for the bank's claim, and, a part of the mass having been sold and a part destroyed by fire, the bank's lien attached to all that remained of the lot. *Ibid.*

Tracing Trust Property.

Suit in equity for a tracing and recovery of certain hides held by a dealer in trust for a bank and wrongfully commingled by him with other hides. *Peoples National Bank* v. *Mulholland*, 152.

Trustee necessary Party to Agreement of Compromise of Contest as to Will.

The court has no jurisdiction under R. L. c. 148, § 15, to authorize an executor to adjust by compromise a controversy concerning a will by an agreement to which trustees to whom property is devised and bequeathed by the will are not parties. *Ellis v. Hunt*, 39.

Bill in Equity for Instructions.

See appropriate subtitle under EQUITY JURISDICTION.

TRUSTEE PROCESS.

A writ of scire facias issued under R. L. c. 189, §§ 45–49, to enforce a judgment charging the defendant as trustee in an action brought by trustee process, is not an independent civil action but is a judicial writ to enforce a judgment and is a part of the proceedings in the original action. *Universal Optical Corp.* v. *Globe Optical Co.* 84.

Under the circumstances, a trustee in an action brought by trustee process in the Municipal Court of the City of Boston was held to have no right of appeal to the Superior Court from a judgment against him upon scire facias issued upon an original judgment affirmed on report of the Appellate Division. *Ibid.*

The omission of St. 1852, c. 312, § 9, re-enacted in substance in Gen. Sts. c. 129, § 9, and in Pub. Sts. c. 167, § 9, from R. L. c. 173, § 11, was held to have been intentional, so that where a writ served by trustee process seasonably was returned to court but the plaintiff neglected to enter it and the trustee did not appear, such trustee cannot maintain a complaint for costs against the plaintiff who sued out the writ. *Whiting* v. *Houghton*, 429.

UNDUE INFLUENCE.

At the trial of jury issues involving the validity of a will, there was evidence tending to show that the chief beneficiary under the will was a sister of the testatrix and that her husband was a physician and attended the testatrix

at a hospital to which she had been taken by him and that the testatrix died at the hospital nineteen days after the will was executed, and it was held that the contestants were entitled to have the jury instructed that the law views with jealousy relations of this nature between a physician and his patient, especially where the patient is enfeebled by disease. *Holbrook* v. *Seagrave*, 26.

UNLAWFUL INTERFERENCE.

It was held that, under the circumstances, a bill in equity might be maintained by a firm who were manufacturers and sellers at retail in various parts of the country of close fitting petticoats constructed in accordance with an invention of one of them to restrain two former employees and a third person from interfering with the business of the plaintiffs by making use of the trade secrets and for damages for past interference, it appearing that the acts of the defendants were done with the deliberate purpose of injuring the plaintiffs' sale of garments manufactured according to the invention. *Aronson* v. *Orlov*, 1.

Although in the suit above described there were allegations by both the plaintiffs and the defendants of rights under assignments of applications for patents, it was held that the State Court had jurisdiction of the suit, both because it did not appear that any patent had been granted and because the gravamen of the suit was the malicious and wrongful interference with the plaintiffs' business and not an infringement of rights under a patent or an application therefor. *Ibid.*

Proper discretionary action of a judge, in a suit in equity involving the right of former employees to interfere with the plaintiffs' exclusive use of an invention not patented, in refusing to permit the defendants to amend their answers by alleging that their application for a patent was pending until three months after the bill in equity was filed, when it was divided and a patent was granted on the amended application. *Ibid.*

In the suit above described it appeared that, owing to a change in fashion, the plaintiffs' invented idea which the defendants had appropriated at the time of the decision had little present value, so that no injunctive relief needed to be granted; but the suit was retained for the awarding of damages to the plaintiffs; and it also was held that the plaintiffs were entitled to interest on that sum from the date of the master's report. *Ibid.*

One, who serves on the employer of a workman a notice of a supposed assignment of wages by the workman, which in fact was made by a different person of the same name, and on being informed by the workman of the mistake unjustifiably refuses to withdraw the notice and thereby causes the workman's discharge, is liable to the workman in an action of tort for the damages resulting from this unlawful interference with his employment. *Doucette* v. *Sallinger*, 444.

In such an action it appeared that the plaintiff was discharged by his employer under a rule, that "any employee executing an assignment of wages will be liable to immediate discharge," and it was held that the presiding judge rightly refused to rule at the defendant's request that the defendant "is not bound by the rule unless it is proven that he had notice of the existence of the rule or reasonable cause to believe that such a rule existed." *Ibid.*

In the same case the judge also properly refused to rule at the request of the

defendant "that the employer had no right to discharge the employee so as to render the defendant liable in damages without using reasonable prudence to ascertain whether or not the L D employed was the L D described in the notice." *Doucette* v. *Sallinger*, 444.

In the same case it was held that a portion of the judge's charge was correct which, properly interpreted, stated that, if the superintendent of the plaintiff's employer without further investigation mistakenly treated the plaintiff as the maker of the assignment of wages, the defendant, without whose unlawful interference the superintendent would not have acted, was the efficient cause of the plaintiff's discharge. *Ibid.*

In the same case it was held that the judge rightly refused to make a ruling which assumed that the plaintiff's employer acted arbitrarily in discharging him, there being no evidence to support this assumption, it appearing clearly that the plaintiff's contract of employment was terminated because of the supposed violation of one of its conditions, namely, that the employee should not assign his wages. *Ibid.*

In the same case it was held that the question, whether the defendant wilfully interfered with the plaintiff's contract of employment, was for the jury and, if they found that he did so wilfully interfere, the plaintiff was entitled to reasonable compensation for his mental distress and anxiety. *Ibid.*

VARIANCE.

See that subtitle under PRACTICE, CIVIL.

WAIVER.

By going to trial on the merits in a suit in equity the defendant waives a right to defend on the ground that the plaintiff has a complete remedy at law. *Aronson* v. *Orlov*, 1.

Where in a suit in equity the defendant answers to the bill without demurrer and goes to trial on the merits, he has waived any right to set up want of equity in the allegations of the bill. *Ryan* v. *Annelin*, 591.

Where a building contract in writing contains a provision that "If any extra work is required, a price for the same must be agreed upon and approved in writing by the architect before such work is begun," the architect has no authority to waive the condition precedent of his approval in writing or to bind the owner by any oral order, and the contractor cannot recover from the owner for extra work and disbursements merely agreed to and approved by the architect orally. *Burns* v. *Thorndike*, 552.

WANTON DESTRUCTION OF PERSONAL PROPERTY.

A lessee under a lease given him to terminate a tenancy at will, who pulls up and throws in a heap growing crops that were planted by the tenant at will, can be found guilty of wantonly destroying the personal property of another upon a complaint under St. 1904, c. 305. *Commonwealth* v. *Galatta*, 308.

Under the rules of criminal pleading, contained in R. L. c. 218, §§ 17, 37, a

complaint under St. 1904, c. 305, for wantonly destroying personal property of another need not allege that the destruction was in a manner and by a means not particularly described or mentioned in R. L. c. 208. *Commonwealth* v. *Galatta*, 308.

Neither § 105 nor § 106 of R. L. c. 208, particularly describes or mentions the wanton destruction of growing crops in a garden appurtenant to a tenement by a lessee lawfully in possession of the land. *Ibid.*

WAY.

Private.

In determining in a suit in equity the question of fact, whether the owner of a tract of land, who conveyed it to different persons by a number of deeds made between the years 1825 and 1850 describing the land as abutting on certain private streets, intended to convey to the grantees of the several lots any right in the fee of such private streets, it is proper to consider the state of the law in this Commonwealth at the time the deeds were made. *Brown* v. *Peabody*, 52.

Where a master in a suit in equity, whose findings had been accepted by the parties, in passing upon the question of fact stated above found "that the original grantor, J P, did not intend to part with the fee in the two streets in question" and further found that "the plaintiff has whatever title J P retained in these streets," it was held that the master was plainly right in finding that the title to the fee in the two streets in question was in the plaintiff. *Ibid.*

In a suit in equity it was found by a master that two streets, the fee to which was in the plaintiff, never had been laid out as public ways and never had become such ways by dedication or prescription and that the use of them by the public was permissive, and it appeared that the town in which they lay, against which the suit was brought, with knowledge of the plaintiff's claim of ownership and against his protest had constructed sewers through these streets without authority to do so, and it was held that the plaintiff was not required to accept indemnity in money damages and was entitled to relief by injunction. *Ibid.*

In the case above described it was found by a master that the plaintiff was damaged in the sum of $250 by reason of the acts of the defendant, which sum included all past and future damages that might accrue to him, and it was held that the maintenance of the sewers in the plaintiff's land was a substantial continuing trespass, for which an assessment of past and future damages could not be made rightfully without the plaintiff's consent. *Ibid.*

In the same suit it appeared that the abuttors on the two streets generally had made connections with the sewers constructed by the defendant and that sewer assessments had been laid by the defendant and had been paid by the abuttors, and it was held that, in view of these facts, the defendant should be allowed a reasonable time within which it might acquire by proper legal proceedings the right to lay and maintain its sewers in the two private streets, if it should choose to do so. *Ibid.*

Accordingly a decree was entered awarding an injunction and commanding the defendant to remove the sewers within five months unless previously

the defendant should have acquired the legal right to their maintenance, the court in the meantime retaining the bill for the assessment of damages already suffered. *Brown* v. *Peabody*, 52.

Public.

Repair.

The provision of St. 1898, c. 578, § 11, relieving street railway corporations from all obligations as to surface repairs of streets, roads and bridges unless the obligation to do so had been imposed in a grant of original location, was not repealed nor superseded by St. 1911, c. 552, so as to revive such an obligation on the part of the Globe Street Railway Company. *Fall River* v. *Public Service Commissioners*, 575.

Defect.

Upon the evidence at the trial of an action against a street railway corporation for personal injuries caused by stumbling over paving blocks in a city street where the defendant was relaying its tracks, it was held that the use or scattering of paving blocks over which the plaintiff testified that she tripped and fell was wholly under the supervision and control of the city and that the defendant was not liable. *Conners* v. *Worcester Consolidated Street Railway*, 357.

The "physical or mental incapacity" which enlarges the period of thirty days within which by R. L. c. 51, §§ 20, 21, a traveller injured by reason of a defect in a highway is required to give notice of the time, place and cause of the injury, in order to recover under § 18 of the statute, is an inability of the person injured to give the notice himself or through another which resulted from a loss of the faculties of the mind or from a lack of power to use the mind because of the loss or impairment of the organs of the body. Mere physical inability to move or to be moved about or to write is not evidence of mental or physical inability. *Goodwin* v. *Fall River*, 529.

It seems that an injury caused by the omission of a city to light a street by reason of which a traveller stepped into a hole or depression in a sidewalk was not caused by a defect in the highway. *Ibid.*

Obstruction for lawful purpose.

If a railroad corporation maintaining an overhead steel bridge above and across a highway has a right to use in a proper manner a swinging staging under the bridge for the purpose of painting the bridge, such right must be exercised with due regard to the public safety and the convenience of travellers. *Hurley* v. *Boston & Maine Railroad*, 365.

The railroad corporation must use such a staging as will not unnecessarily obstruct the way and will not be likely to frighten horses; it must not maintain the staging for more than a reasonable time and, while the staging is over the highway, the corporation must use due care to prevent injury to travellers and to provide warning signals during periods of darkness. *Ibid.*

In an action against a railroad corporation for damages to the plaintiff's horse, wagon and harness, by reason of the plaintiff's horse being frightened after sundown by a swinging staging maintained by the defendant without lights under an overhead bridge crossing above the highway, it is

Way (*continued*).

a question of fact for the jury whether the temporary obstruction of the public way by the defendant was a reasonable one or whether the staging was an unreasonable structure or was maintained negligently. *Hurley* v. *Boston & Maine Railroad*, 365.

Adjoining fence.

A fence, which had stood for thirty years, made of iron pickets about two feet high standing upon a stone curbing thirteen inches high, the front face of the curbing adjoining a public sidewalk and the nearest part of the iron fence being two inches back from the face of the curbing, cannot be found to constitute a nuisance. *Noyes* v. *Carr*, 339.

The owner of such a fence, on whose land it stands, owes no duty to a traveller on the adjoining sidewalk in regard to the fence except not to injure him by wilful, wanton or reckless conduct. *Ibid.*

WIDOW.

By Pub. Sts. c. 135, § 3, as amended by Sts. 1882, c. 141; 1885, c. 276, under circumstances described, the widow of the second son of a testatrix became entitled to one half of an interest which had vested in her husband under the provisions of his mother's will. *Whitman* v. *Whitney*, 18.

A suit in equity cannot be maintained by a widow to marshal the assets of her husband's estate by ordering the executor of his will to pay the debts and charges of administration out of the proceeds from the sale of real estate owned by him in a foreign country and not out of the assets of his estate in this Commonwealth. *Tod* v. *Mitchell*, 541.

WILL.

Where a will purports to dispose of all of the property of the testator, evidence is not admissible, for the purpose of showing that the will did not operate as to an interest of the testator under the will of his mother and that the deceased was intestate as to such interest, which tends to show that the testator was of the opinion and believed that he had no interest under his mother's will and that he was so advised by his attorney. *Whitman* v. *Whitney*, 18.

It is a reasonable inference from the fact that a testator voluntarily signed a will that he knew its contents. *Holbrook* v. *Seagrave*, 26.

An opinion as to the capacity of a testatrix, formed by one of the attesting witnesses to the will, who had not previously known the testatrix, after talking with the other attesting witnesses subsequently to the time of the execution of the will, where such witness states that she has no opinion based solely upon what she observed at the time the will was signed, is not admissible in evidence. *Ibid.*

At the trial of jury issues involving the validity of a will, there was evidence tending to show that the chief beneficiary under the will was a sister of the testatrix and that her husband was a physician and attended the testatrix at a hospital to which she had been taken by him and that the executrix died at the hospital nineteen days after the will was executed, and it was held that the contestants were entitled to have the jury instructed that the

law views with jealousy relations of this nature between a physician and his patient, especially where the patient is enfeebled by disease. *Holbrook* v. *Seagrave*, 26.

In a suit in equity by the trustee under a will for instructions, where it appears that by the clear terms of the will the proceeds from the sale of a certain house of the testatrix are given to a certain church corporation, a letter written by the testatrix dated nearly eight years after the date of her will and addressed to the executors of her will but not executed as a codicil, declaring her intention to make a change in her will in regard to the disposition of the proceeds from the sale of the house in question, is not admissible in evidence and cannot be considered by the court. *Taber* v. *St. Peter's Parish*, 312.

At the trial of a controversy between the proponent of a will, who was the husband of the alleged testatrix and was made the residuary legatee by the proposed will, and the heirs at law of the signer of the instrument, who was alleged by the contestants to have been of unsound mind, an attorney at law, who did not draw the alleged will but had acted as the legal advisor of the alleged testatrix, properly may be permitted to testify as a witness for the contestants, against the objection of the proponent of the will, that "two or three years ago he had a conversation with the testatrix when she came to consult him relative to difficulties" with her husband and may tell what she said to him in that conversation. *Panell* v *Rosa*, 594.

At the trial described above, certain testimony of the same witness relating to a conversation between himself and the husband was held to have had no bearing upon the question of the soundness of mind of the deceased wife and to have been immaterial, so that its admission was harmless error under St. 1913, c. 716, § 1, and that it therefore afforded no ground for sustaining an exception. *Ibid.*

In the same case on the testimony it was held that the single justice rightly refused to rule that there was no evidence that would justify a finding that the alleged testatrix was of unsound mind because the burden was on the proponent of the will to show that the alleged testatrix was of sound mind, and that with the evidence stated above the general presumption of sanity did not as matter of law require a finding of testamentary capacity. *Ibid.*

Construction of wills, see DEVISE AND LEGACY.

COMPROMISE OF CONTROVERSY CONCERNING WILL, see that title.

WIRES.

Action for personal injuries resulting from a workman of a telephone company coming in contact with electric light wires on a pole of the telephone company. *Whalen* v. *New England Telephone & Telegraph Co.* 361.

WITNESS.

Expert.

As to action of a judge presiding at the trial of an action upon a bond of indemnity delivered in the State of New York, in permitting associate

counsel for the plaintiff to testify as an expert witness as to the law of New York although he knew that law only by investigation and study, never having practised in that State, it was held, with some hesitation under the circumstances of the trial that it could not be said that the determination by the judge of the preliminary question of the qualification of the expert was clearly wrong and that therefore it must stand. *Barker* v. *United States Fidelity & Guaranty Co.* 421.

Appearance of Witness as Evidence.

Under St. 1915, c. 236, it is proper for an arbitration committee and the Industrial Accident Board to consider as evidence the appearance of the injured employee as a witness. *Gagnon's Case*, 334.

Life Circumstances of Witness.

At the trial of an action of tort for personal injuries, where the plaintiff and the defendant both have testified as witnesses, it is within the discretionary power of the presiding judge to allow the plaintiff and the defendant each to be asked how many children and how much of a family he has in order to enable the jury to learn in a general way "what sort of a man is on the witness stand." *Luiz* v. *Falvey*, 253.

Impeachment.

At the trial of a petition under St. 1906, c. 463, Part I, § 37, by a corporation for the assessment of damages to the petitioner's land and factories by changes of grade made in the abolition of the grade crossing of a railroad with a highway, where the president of the petitioner had testified as a witness, it was held to be within the discretion of the trial judge to admit in evidence, as bearing on the credibility of the witness, the annual reports by the petitioner to the Secretary of the Commonwealth under St. 1903, c. 437, § 45, R. L. c. 110, § 51, and Pub. Sts. c. 106, § 54, a letter to the local assessor, and returns to the Tax Commissioner for certain years made under Pub. Sts. c. 13, § 38, as amended by R. L. c. 14, § 37. *Union Glass Co.* v. *Somerville*, 202.

In an action of contract by a physician for compensation for services rendered to the defendant's wife, the defence relied upon was that the defendant was living apart from his wife for justifiable cause and an issue was, whether certain letters of an incriminating nature, addressed to the husband, were genuine. Specimens of the handwriting of a certain woman who denied that she wrote the letters being in evidence, the letters were held properly to have been admitted for the purpose of comparison of handwriting to identify the writer of the letters, and also for the purpose of contradicting the testimony of the woman witness, that she did not write the letters and never had seen them. *Leavitt* v. *Maynes*, 350.

Attorney at Law as Witness.

See appropriate subtitle under ATTORNEY AT LAW.

WORDS.

"Absolute." See *Lorando* v. *Gethro*, 181, 185.
"Average weekly wages." See *Gagnon's Case*, 334, 336
"Bodily injury." See *Williams* v. *Nelson*, 191, 196.
"Civil cause." See *Stevens, landowner*, 368, 373.
"Decision." See *Atlantic Maritime Co.* v. *Gloucester*, 519, 521.
"Driven or manipulated." See *Williams* v. *Nelson*, 191, 195.
"Family." See *Mahoney's Case*, 555, 556.
"Final and conclusive." See *Commissioner of Public Works* v. *Justice of Municipal Court of Dorchester*, 12, 16.
"Heirs." See *State Street Trust Co.* v. *Sampson*, 411, 413.
"Issue." See *Welch* v. *Colt*, 511, 515.
"Lineal descendants." See *Green* v. *Hussey*, 537, 539, 540; *Green* v. *Kelley*, 602, 606.
"Loss." See *Lorando* v. *Gethro*, 181, 184, 185, 186.
"Loss or damage." See *Lorando* v. *Gethro*, 181, 184; *Williams* v. *Nelson*, 191, 195.
"Occur." See *Lorando* v. *Gethro*, 181, 184.
"Owner." See *Hurnanen* v. *Nicksa*, 346, 350.
"Personal injury." See *Maggelet's Case*, 57, 60, 61, 62.
"Property." See *Ashley* v. *Three Justices of Superior Court*, 63, 73.
"Public place." See *Cunningham* v. *Bright*, 385, 389.
"Right heirs at law." See *State Street Trust Co.* v. *Sampson*, 411, 412, 413.
"Shall." See *Ashley* v. *Three Justices of Superior Court*, 63, 69, 70.
"Special attachment." See *Cunningham* v. *Bright*, 385, 387.
"Suits between two or more persons." See *Ashley* v. *Three Justices of Superior Court*, 63, 73.
"Then." See *State Street Trust Co.* v. *Sampson*, 411, 413.
"Wages." See *Gagnon's Case*, 334, 338.

WORKMEN'S COMPENSATION ACT.

Extraterritorial Effect.

The provisions of St. 1911, c. 751, Part I, § 1, doing away with certain defences in actions for personal injuries sustained by employees in the course of their employment, have no application to personal injuries received by an employee outside this Commonwealth. *Cogliano* v. *Ferguson*, 147.

Jurisdiction and Power of Industrial Accident Board.

The Industrial Accident Board is not a court of general or limited common law jurisdiction. It is purely and solely an administrative tribunal, specifically created to administer the workmen's compensation act with the assistance of the Superior Court, and as such a tribunal the board possesses only such authority and power as have been conferred upon it by express grant or arise from such a grant as necessary and incident to the granted powers. *Levangie's Case*, 213.

From the nature of the Industrial Accident Board as a special administrative

tribunal created for the administration of the workmen's compensation act it follows that a full performance of the conditions of the act is prerequisite to its jurisdiction and that the extent and limits of its statutory authority cannot be enlarged, diminished or destroyed by express consent or by waiver. *Levangie's Case*, 213.

Circumstances under which, under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part III, § 5, as amended by St. 1912, c. 571, § 10, and St. 1914, c. 708, § 9, it was held that the Industrial Accident Board had no jurisdiction to call an arbitration committee with regard to additional compensation, after an agreement for compensation filed with and approved by the Industrial Accident Board had been performed fully by the insurer and there never had been any disagreement as to the continuance of any weekly payment under the agreement. *Ibid.*

In the same case it appeared that, at the time the agreement for compensation was approved by the Industrial Accident Board, an examination of the records of the hospital and of the report of a physician would have disclosed to the board the fact that the legs of the employee were then and always would be permanently incapable of use, and it was said that the approval of the agreement by the board without an examination and consideration of this evidence did not afford a proper ground for reopening the agreement. *Ibid.*

Report by Subscriber to Industrial Accident Board.

The provision of the workmen's compensation act contained in St. 1911, c. 751, Part III, § 18, which makes it the duty of an employer, who is a subscriber, to "keep a record of all injuries," and "within forty-eight hours . . . after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the Industrial Accident Board," requires the employer to find out and report the facts of each injury, not to make a report of claims or statements of injuries. *Brown's Case*, 31.

Such a report made to the Industrial Accident Board by the timekeeper of a construction company, which was a subscriber under the act, that the employee "ruptured himself about three weeks ago and just began to feel the effects of it the last few days," is evidence warranting a finding under St. 1911, c. 751, Part II, § 18, that the subscriber had knowledge of the injury which made a notice under §15 unnecessary. *Ibid.*

Subscriber's Knowledge of Injury.

Report under St. 1911, c. 751, Part III, § 18, to the Industrial Accident Board by the timekeeper of a construction company, which was a subscriber under the act, that the employee "ruptured himself about three weeks ago and just began to feel the effects of it the last few days," is evidence warranting a finding under St. 1911, c. 751, Part II, § 18, that the subscriber had knowledge of the injury which made a notice under § 15 unnecessary. *Brown's Case*, 31.

In order that such knowledge should dispense with the necessity of notice, it must be shown to have existed within the time when a notice in writing, if required, should have been given, that is, as soon as practicable after the happening of the injury. *Ibid.*

In a claim under the workmen's compensation act of compensation for an injury by a rupture, which did not manifest itself immediately upon the strain which caused it, it was held that a finding was warranted that the injury occurred on the eighteenth day of the month, although the strain which caused it was on the first day of the month, and that the subscriber, who learned of it on the twenty-second day of the month, had knowledge of it as soon as practicable after the happening thereof. *Brown's Case*, 31.

Procedure.

Notice.

In order that knowledge by a subscriber under St. 1911, c. 751, Part II, § 18, may dispense with the necessity of notice it must be shown to have existed within the time when a notice in writing, if required, should have been given, that is, as soon as practicable after the happening of the injury. *Brown's Case*, 31.

Arbitration committee.

Circumstances under which, under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part III, § 5, as amended by St. 1912, c. 571, § 10, and St. 1914, c. 708, § 9, it was held that the Industrial Accident Board had no jurisdiction to call an arbitration committee with regard to additional compensation, after an agreement for compensation filed with and approved by the Industrial Accident Board had been performed fully by the insurer and there never had been any disagreement as to the continuance of any weekly payment under the agreement. *Levangie's Case*, 213.

Evidence.

In a claim under the workmen's compensation act the Industrial Accident Board may be warranted in finding that an employee's death resulted from an injury arising out of and in the course of his employment on evidence that is wholly circumstantial. *Uzzio's Case*, 331.

Under St. 1915, c. 236, it is proper for an arbitration committee and the Industrial Accident Board to consider the personal appearance of the injured employee upon the witness stand in passing upon the question whether his seeming intelligence, health and aptitude for the work in which he was employed would have been likely to receive recognition by an increase of his wages by his employer if the injury had not been received. *Gagnon's Case*, 334.

Finding by Industrial Accident Board.

Action by the Industrial Accident Board awarding compensation, which could not have been done without refusing certain requests of the insurer for rulings, was held to show that the rulings were refused and to make unnecessary a specific statement to that effect in the record of an appeal to the Superior Court. *Brown's Case*, 31.

Upon a claim under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 11 (*b*) as amended by St. 1914, c. 708, § 6, for additional compensation for the specific injury consisting of "the reduction of one tenth of normal vision in either eye with glasses," where

the Industrial Accident Board decided that "the employee has sustained a reduction of vision in the injured eye to one tenth of normal with glasses," it was held that the board interpreted correctly the intention of the Legislature in considering the vision of one eye as compared with the normal vision of both eyes together and that their decision was warranted. *O'Brien's Case*, 211.

Report of evidence.

Where on an appeal to the Superior Court a motion of the insurer, that the report be recommitted to the Industrial Accident Board in order that a portion of certain testimony should "be set out verbatim or indicated by page and line of the testimony," was denied, it was held that, if it was necessary to state what the evidence was which was stricken out, a mere statement of such evidence would be sufficient, so that the motion was denied properly. *Brown's Case*, 31.

Where in a proceeding under the workmen's compensation act the record showed that at the hearing before the arbitration committee the insurer requested "that the typewritten testimony submitted by the insurer be embodied in the evidence in the report" and the record stated that "in place thereof a verbatim transcript, by the board's stenographer, of the evidence given by the employee is attached hereto. The extracts of the testimony of Dr. R as furnished by the insurer are attached as corrected," and where the extracts mentioned were all the evidence introduced by the insurer, it was held, that the action of the committee gave the insurer all its rights. *Ibid.*

Appeal.

Action by the Industrial Accident Board awarding compensation, which could not have been done without refusing certain requests of the insurer for rulings, was held to show that the rulings were refused and to make unnecessary a specific statement to that effect in the record of an appeal to the Superior Court. *Brown's Case*, 31.

On an appeal to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board, when copies of the decision of the board and all papers in connection therewith have been transmitted to the Superior Court it is the duty of that court to take such action and to make such a decree as the law requires on the facts found by the board. *Ibid.*

The Superior Court has jurisdiction over the claim to compensation in the same way and to the same extent that it has over a suit in equity pending in that court in which the facts have been found by a master. *Ibid.*

Where on an appeal to the Superior Court a motion of the insurer, that the report be recommitted to the Industrial Accident Board in order that a portion of certain testimony should "be set out verbatim or indicated by page and line of the testimony," was denied, it was held that, if it was necessary to state what the evidence was which was stricken out, a mere statement of such evidence would be sufficient, so that the motion was denied properly. *Ibid.*

Upon an appeal from a decision of the Industrial Accident Board in a claim under the workmen's compensation act the Superior Court may vacate a decree which was made by that court without notice of a pending petition

by the insurer for a rehearing before the Industrial Accident Board. *Maggelet's Case*, 57.

Vacation of decree.

Upon an appeal from a decision of the Industrial Accident Board in a claim under the workmen's compensation act the Superior Court may vacate a decree which was made by that court without notice of a pending petition by the insurer for a rehearing before the Industrial Accident Board. *Maggelet's Case*, 57.

Compromise agreement.

Circumstances under which, under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part III, § 5, as amended by St. 1912, c. 571, § 10, and St. 1914, c. 708, § 9, it was held that the Industrial Accident Board had no jurisdiction to call an arbitration committee with regard to additional compensation, after an agreement for compensation filed with and approved by the Industrial Accident Board had been performed fully by the insurer and there never had been any disagreement as to the continuance of any weekly payment under the agreement. *Levangie's Case*, 213.

In the same case it appeared that, at the time the agreement for compensation was approved by the Industrial Accident Board, an examination of the records of the hospital and of the report of a physician would have disclosed to the board the fact that the legs of the employee were then and always would be permanently incapable of use, and it was said that the approval of the agreement by the board without an examination and consideration of this evidence did not afford a proper ground for reopening the agreement. *Ibid.*

Injuries to which Act applies.

Neurosis of the nerves supplying certain muscles, resulting from a posture which causes a cigar-maker when at his work to bend with shoulders forward so as to induce "pressure on the brachial plexus," is not a "personal injury" within the meaning of St. 1911, c. 751, Part II, § 1, for which such employee may be awarded compensation under the workmen's compensation act. *Maggelet's Case*, 57.

In a claim under the workmen's compensation act the Industrial Accident Board may be warranted in finding that an employee's death resulted from an injury arising out of and in the course of his employment on evidence that is wholly circumstantial. *Uzzio's Case*, 331.

In a claim under the workmen's compensation act by the dependent widow of a deceased workman employed in a mill and engaged in shovelling coal from cars, circumstantial evidence was held to warrant a finding by the Industrial Accident Board that the death of the employee resulted from an injury arising out of and in the course of his employment. *Ibid.*

A workman sixty-four years of age, who was employed in a comb factory, and was injured by a fall when he was descending a stairway on the outside of the factory building which led from the second floor to the ground, which, although there were two other ways of going to the street from the second floor, were used by some of the men in the department of the factory in

which the employee worked, was held to be entitled to maintain a claim, the reasonable probability that an employee might be injured in descending such a staircase being a risk of the claimant's employment in that factory. *O'Brien's Case*, 380.

Persons to whom Act applies.

Where a city hires from a master teamster horses, a cart and a driver to carry materials from one place to another as the officers or servants of the city may direct, the driver being left to deal with the horses in his own way, the driver is not in the employ of the city within the meaning of St. 1913, c. 807, § 6. *Clancy's Case*, 316.

Dependency.

Where a deceased employee, who had had a minor daughter and who had lived with his sister and her minor son in a house that formerly had belonged to their mother, who had died intestate, had made weekly payments toward the support of the household whenever he could obtain employment and had purchased some incidental household furnishings and supplies besides cultivating the garden, it was held that it could not be found that the employee's sister, who was not his next of kin, was a member of his family so as to come within the definition of "Dependents" contained in St. 1911, c. 751, Part V, § 2. *Mahoney's Case*, 555.

Amount of Compensation.

Under St. 1915, c. 236, providing that, "Whenever an employee is injured under circumstances that would entitle him to compensation under the provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven, and acts in amendment thereof and in addition thereto, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, his wages would be expected to increase, that fact may be taken into consideration in determining his weekly wages," the word "wages" means the wages earned in the particular employment out of which the injury arose. *Gagnon's Case*, 334.

Under St. 1915, c. 236, it is proper for an arbitration committee and the Industrial Accident Board to consider the personal appearance of the injured employee upon the witness stand in passing upon the question whether his seeming intelligence, health and aptitude for the work in which he was employed would have been likely to receive recognition by an increase of his wages by his employer if the injury had not been received. *Ibid.*

Additional Compensation.

Upon a claim under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 11 (*b*) as amended by St. 1914, c. 708, § 6, for additional compensation for the specific injury consisting of "the reduction to one tenth of normal vision in either eye with glasses," where the Industrial Accident Board decided that "the employee has sustained a reduction of vision in the injured eye to one tenth of normal with glasses," it was held that the board interpreted correctly the intention of the Legis-

lature in considering the vision of one eye as compared with the normal vision of both eyes together and that their decision was warranted. *O'Brien's Case*, 211.

Circumstances under which, under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part III, § 5, as amended by St. 1912, c. 571, § 10, and St. 1914, c. 708, § 9, it was held that the Industrial Accident Board had no jurisdiction to call an arbitration committee with regard to additional compensation, after an agreement for compensation filed with and approved by the Industrial Accident Board had been performed fully by the insurer and there never had been any disagreement as to the continuance of any weekly payment under the agreement. *Levangie's Case*, 213.

In the same case it appeared that, at the time the agreement for compensation was approved by the Industrial Accident Board, an examination of the records of the hospital and of the report of a physician would have disclosed to the board the fact that the legs of the employee were then and always would be permanently incapable of use, and it was said that the approval of the agreement by the board without an examination and consideration of this evidence did not afford a proper ground for reopening the agreement. *Ibid.*

Expenses for Physician and Hospital.

The provision of the workmen's compensation act in St. 1911, c. 751, Part III, § 13, as amended by St. 1914, c. 708, § 12, that the charges of physicians "for services under this act shall be subject to the approval of the Industrial Accident Board," refers only to the services for which under St. 1911, c. 751, Part II, § 5, the insurer is liable, and a physician's bill for services rendered more than two weeks after the injury, for which the employee is liable and the insurer is not, does not require the approval of the Industrial Accident Board, although the services were rendered in treating the employee for the consequences of the injury for which he was awarded compensation under the act. *Holland* v. *Zeuner*, 142.

Where a manufacturer, who was a subscriber under the workmen's compensation act, had posted notices in his factory giving the name and location of a hospital where "medical and hospital attendance" would be furnished for injured employees, and an injured employee, when urged to go to the designated hospital, replied that he "did not want to bother," and afterwards was attended by a physician of his own choosing, under St. 1911, c. 751, Part II, § 5, as amended by St. 1914, c. 708, § 1, the insurer is not liable to the physician for any part of his services. *Davidson's Case*, 257.

WORLD PEACE FOUNDATION.

A corporation named the World Peace Foundation, organized under the laws of this Commonwealth, which was a beneficiary under the will of Edwin Ginn, who had organized it, was held to be a charitable society or institution within the meaning of St. 1912, c. 678, § 1, and St. 1909, c. 490, Part I, § 5, and accordingly the passing of property to it by will was held not to be subject to a legacy and succession tax. *Parkhurst* v. *Treasurer & Receiver General*, 196.

WRIT OF PROHIBITION.

See PROHIBITION, WRIT OF.

WRONGDOER WITHOUT REMEDY.

In a suit in equity to obtain the discharge of a mortgage upon personal property, where it appears that the mortgage was given to secure the mortgagee for his liability as indorser upon certain promissory notes for $1,400 and that these notes have been paid in full, it is no defence that the mortgage was made for an unnecessarily large sum and was given by the plaintiff for the purpose of deceiving and defrauding his creditors, which fraud was participated in by all the parties to the mortgage. *Murphy* v. *Moore*, 565.

STATUTES CITED AND EXPOUNDED.

STATUTES OF THE UNITED STATES.

1898, c. 541, § 60 b.	Bankruptcy	440
1903, c. 487, § 13.	"	440
1910, c. 412, § 11.	"	440
1911, c. 231, § 256.	Judicial Procedure	6
26 U. S. Sts. at Large, c. 250, § 1.	Ship	526
29 U. S. Sts. at Large, c. 67, § 1.	"	526
36 U. S. Sts. at Large, 1161.	Judicial Procedure	6

REVISED STATUTES OF THE UNITED STATES.

§§ 4141, 4178.	Ship	526

STATUTES OF INDIANA.

Gen. Laws, 1873, c. 43, § 3.	Legitimacy	604

STATUTES OF THE COMMONWEALTH.

1784, c. 28, § 9.	Costs	430
1794, c. 65, § 4.	Trustee Process	431
1840, c. 80.	Negligence Causing Death	500
1841, c. 125.	Railroad	278
—— —— § 1.	"	277
1846, c. 271, § 3.	"	278
1851, c. 233, § 7.	Writ	430
1852, c. 312, § 7.	"	430
—— —— § 9.	Costs	430, 431
1859, c. 196, § 32.	Report to Full Court	521
1864, c. 93.	Probate Court	291
1871, c. 352.	Grade Crossing	500
1872, c. 295.	Slade's Ferry Bridge	579
1878, c. 231, § 1.	Report to Full Court	521
1879, c. 205, § 2.	Railroad	278, 279
1882, c. 141.	Distribution	24, 25
1885, c. 276.	"	24, 25
1898, c. 578, § 11.	Street Railway	578, 579
1902, c. 310.	Marriage	606
1903, c. 437, § 45.	Corporation	203, 204
—— —— § 48.	"	204
—— —— § 52.	"	486

1903, c. 437, § 60. Corporation 524
—— —— § 75. " 102
1904, c. 305. Growing Crops 311
1905, c. 256. Distribution 24, 25
1906, c. 223. Mechanic's Lien 601
—— c. 463, Part I, § 37. Grade Crossing 203
—— —— —— § 63. Negligence Causing Death 472, 477
—— —— —— § 67. " " " 477
—— —— Part II, § 104. Railroad 277, 279
—— —— Part III, § 79. Street Railway 579
1907, c. 392. Negligence Causing Death 500 n.
—— c. 576, § 21. Insurance 452
—— —— § 60. " 302
—— —— § 60, cl. 7. " 303, 304
—— —— § 73. " 188
—— c. 578. Tax 102
1908, c. 237, § 5 (3). Sales 130
1909, c. 236. Judgment 466, 477
—— c. 237. Mechanic's Lien 601
—— c. 490, Part I, § 5. Tax 198
—— —— —— § 41. " 233, 234
—— —— —— § 42. " 233
—— —— —— § 43. " 233, 235
—— —— —— § 72. " 235
—— —— —— §§ 73, 76. " 234
—— —— —— § 77. " 232, 234, 520
—— —— —— § 79. " 231, 520
—— —— —— § 85. " 233
—— —— Part II. " 444
—— —— Part III, § 41. " 204
—— —— —— § 56. " 106, 107, 108, 121, 524
—— —— —— § 71. " 201
—— —— Part IV, § 1. " 198
—— c. 514, § 132. Employer's Liability 365
—— c. 515. Tax 233
—— c. 534, § 2. Motor Vehicle 350
1910, c. 95. Conservator 228
—— c. 555, § 5. Report to Full Court 521
—— c. 576. Married Woman 306
—— c. 605, § 5. Motor Vehicle 256
—— c. 654, §§ 1, 6. Slade's Ferry Bridge 579
1911, c. 89. Tax 233
—— c. 178. Employer's Liability 365
—— c. 212, § 1. Exceptions 570
—— c. 552. Slade's Ferry Bridge 578, 579
—— c. 624, § 1. Civil Service 15
—— c. 751, Part I, § 1. Workmen's Compensation 61, 150
—— —— Part II, § 1. " " 57
—— —— —— § 5. " " 143, 257
—— —— —— §§ 6, 9–11. " " 336

1911, c. 751, Part II, § 11.	Workmen's Compensation 218
—— —— —— § 11 (*b*).	" " 212
—— —— —— § 15.	" " 36, 37, 216, 217, 218
—— —— —— § 18.	" " 32
—— —— —— § 22.	" " 215
—— —— —— § 23.	" " 216, 218
—— —— Part III, § 3.	" " 217
—— —— —— § 4.	" " 215
—— —— —— § 5.	" " 215, 217
—— —— —— § 11.	" " 32, 215, 217
—— —— —— § 13.	" " 143
—— —— —— § 17.	" " 188
—— —— —— § 18.	" " 36, 37
—— —— Part V, § 2.	" " 336, 338, 556
1912, c. 271, § 1.	Conditional Sale 209
—— c. 360.	Mortgage 420
—— c. 400.	Motor Vehicle 350
—— c. 571, § 2.	Workmen's Compensation 212
—— —— § 5.	" " 216, 218,
—— —— § 8.	" " 217
—— —— § 9.	" " 215
—— —— § 10.	" " 215, 217
—— —— § 14.	" " 32, 215, 217
—— c. 649, §§ 2, 3, 9.	Municipal Court of the City of Boston 86
—— —— § 8.	Municipal Court of the City of Boston 71
—— c. 678, § 1.	Tax on Legacies and Successions 170, 198
—— c. 751, § 5.	Workmen's Compensation 216, 218
1913, c. 257.	Foreign Corporation 587, 588
—— c. 277, § 1.	Corporation 484
—— —— § 2.	" 486
—— —— § 3.	" 485
—— c. 498.	Tax on Legacies and Successions 170
—— c. 655, §§ 20, 55.	Building Laws 372
—— c. 716.	Legal Procedure 348, 487, 523
—— —— § 1.	New Trial 204, 327, 588, 598
—— —— § 2.	Judgment 196, 287, 298
—— —— § 3.	Amendment 395
—— —— § 5.	Case Stated 304
—— c. 784, §§ 20, 21, 29.	Public Service Commission 580
—— —— § 27.	" " " 581
—— c. 807, § 6.	Workmen's Compensation 318
—— c. 813, § 12.	" " 61
—— c. 835.	Corrupt Practices Act 68
—— —— § 259.	Elections 263
—— —— § 348.	" 73 n.

1913, c. 835, §§ 362, 363.	Elections	74 n.
—— —— § 366.	"	74
—— —— § 368.	"	73
—— —— § 369.	"	74, 83
—— —— § 371.	"	79
—— —— § 497.	"	75
1914, c. 35, §§ 2, 4.	Municipal Court of the City of Boston	86
—— c. 198, § 5.	Tax	234
—— c. 409.	Municipal Court of the City of Boston	86
—— c. 464.	Insurance	183, 193
—— —— § 1.	"	184, 186
—— —— § 2.	"	184
—— c. 553.	Contributory Negligence	476, 480
—— c. 624, § 14.	Nuisance	267
—— c. 699, § 8.	Executor and Administrator	289
—— c. 708, § 1.	Workmen's Compensation	257
—— —— §§ 2, 4–6.	" "	336
—— —— § 6.	" "	212
—— —— § 8.	" "	215
—— —— § 9.	" "	215, 217
—— —— § 12.	" "	143
—— c. 724.	Tax	106, 107, 108, 112, 113, 122
—— c. 783.	Corrupt Practices Act	68
—— —— § 10.	Elections	74, 81
—— —— § 10 (*b*), (*c*).	"	69
—— —— § 10 (*d*).	"	80, 83
—— —— § 11.	"	79
—— —— § 12.	"	75
1915, c. 112, §§ 1, 2.	Land Court	244
—— cc. 123, 275.	Workmen's Compensation	217
—— c. 146.	Summary Process	395
—— c. 151, § 1.	Executor and Administrator	289
—— —— § 2.	Interest	174, 289
—— c. 236.	Workmen's Compensation	336
—— c. 251.	Civil Service	15
—— c. 267, Part I, § 4.	Municipal Corporations	251, 252, 253
—— —— Part III, § 7.	" "	251, 252
—— c. 292.	Mechanic's Lien	601
1917, c. 345.	Report to Full Court	520, 521

REVISED STATUTES.

c. 76, § 23.	Marriage	606
c. 109, § 51.	Trustee Process	431

GENERAL STATUTES.

c. 44, § 7.	Way	279
c. 91, § 1, cl. 1.	Descent	540

c. 91, § 12.	Descent	540
c. 129, § 9.	Declaration	431
c. 142, § 62.	Trustee Process	431

PUBLIC STATUTES.

c. 13, § 38.	Tax	203
c. 106, § 54.	Corporation	203
c. 113, § 7.	Street Railway	578
c. 125, § 1.	Descent	541
—— § 1, cl. 1.	"	540
c. 135, § 3.	Distribution	24, 25
c. 167, § 9.	Declaration	431
c. 183, § 75.	Trustee Process	431

REVISED LAWS.

c. 13, §§ 13, 14, 43, 53.	Tax	444
c. 14, § 37.	"	203, 204
c. 25, § 64.	Town Clerk	210
c. 51, § 18.	Way	516, 529
—— § 20.	"	359, 531
—— § 21.	"	531
c. 54, § 2.	Law of the Road	480
c. 73, § 41.	Negotiable Instruments	551
c. 74, § 1, cl. 4.	Statute of Frauds	395
c. 100, § 1.	Intoxicating Liquors	549
c. 101, § 11.	Nuisance	267
c. 110, § 51.	Corporation	203
c. 111, § 268.	Railroad	500, 501
c. 112, § 11.	Street Railway	578
—— § 44.	" "	359, 579
c. 128, § 37.	Land Court	388
c. 133, § 1.	Descent	541
c. 140, § 3, cl. 3.	Distribution	24, 25
c. 141, § 19.	Executor and Administrator	289, 321
—— § 20.	" " "	289
c. 142.	Insolvent Estates	472
—— § 2.	" "	469
c. 145, § 40.	Conservator	225
—— § 41.	"	228
c. 147, § 1.	Trusts	535
c. 148, § 15.	Compromise	43
—— § 16.	"	45
c. 150, § 15.	Executor's Accounts	170
c. 151, § 14.	Marriage	606
c. 153, § 2.	Husband and Wife	306, 551
c. 157, § 5.	Superior Court	71
c. 159, § 2.	Equity Jurisdiction	194
—— § 3.	" "	193

c. 159, § 3, cl. 7.	Creditor's Bills 187
c. 162, § 9.	Probate Appeal 46, 467
—— § 10.	" " 438
—— § 13.	" " 287
—— § 23.	" " 239
—— § 44.	Probate Court 239
—— § 48.	" " 291
c. 173, § 11.	Writ of Entry 430, 431
—— § 28.	Equitable Defence 561
—— § 52.	Amendment 587
—— § 105.	Report to Full Court 521
—— § 106.	Exceptions 373
—— § 108.	" 31
c. 174, § 8.	Set-off 394
c. 175, § 66.	Declarations of Deceased Persons 518, 564
c. 177, § 8.	Judgment 12
—— § 9.	" 583
c. 178, §§ 1, 47.	Execution 387, 388
—— § 28.	Notice 389
c. 187, § 14.	Mortgage 420
c. 189, §§ 45–49.	Trustee Process 85
—— § 69.	" " 431
c. 197, § 1.	Mechanic's Lien 583
—— §§ 17, 20.	" " 601
—— § 28.	" " 582, 583, 600, 601
c. 201, § 2.	Claim against Commonwealth 71
c. 203, § 9.	Costs 593
c. 208, §§ 105, 106.	Trespass 311
c. 218, §§ 17, 37.	Indictment 311

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